IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISON

**BEFORE** :-
THE HON'BLE JUSTICE SHAMPA SARKAR

**AP- 338 of 2022**
GA COM 2 of 2024

BHARAT PETROLEUM CORPORATION LIMITED
VS
HALDIA PETROCHEMICALS LTD.

| | | |
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| For the Petitioner | : | Mr. Tilak Kr. Bose, Sr. Adv.<br>Ms. Trisha Mukherjee, Adv<br>Mr. Chetan Kr. Kabra, Adv. |
| For the Respondent | : | Mr. Sabyasachi Chaudhury, Sr. Adv.<br>Mr. Rajarshi Dutta, Adv.<br>Mr. Shounak Mukhopadhyay, Adv.<br>Mr. Debargha Basu, Adv. |
| Hearing concluded on | : | 21.03.2025 |
| Judgment on | : | **19.06.2025** |

**Shampa Sarkar, J.**

1. GA COM 2 of 2024 is an application filed by HPL (the award holder) for certain reliefs and directions. The award holder prayed for a direction upon the Registrar Original Side, High Court at Calcutta to

encash/invoke the bank guarantee for a sum of Rs. 15,65,50,000/- furnished by the award debtor/BPCL and to transmit the entirety of the amount of Rs. 15.5 crores under the bank guarantee, in favour of the award holder. The award holder also undertook to furnish adequate security. In effect, a modification of the order dated June 23, 2022 passed in AP 338 of 2022 was prayed for. Further direction was sought upon the award debtor to furnish additional security of Rs. 2.3 crores. This court had directed filing of affidavits to the said application and proceeded to hear out the application for setting aside the award.

2. AP – 338 of 2022, is the application for setting aside the Award dated December 30, 2021 passed by an Arbitral Tribunal, comprising of three retired Hon'ble Judges. The petitioner (BPCL) was the claimant and the respondent (HPL) was the respondent in the arbitral proceeding. The parties entered into an Agreement for Sale and purchase of Naphtha on May 25, 2017. The terms and conditions of sale and supply were clearly specified in the agreement. Both the parties were signatories to the said agreement. BPCL was the seller and HPL was the buyer.

3. Disputes and differences arose between the parties when HPL did not pay the balance price of the goods sold and delivered between July 29, 2017 and August, 2017. The balance price was calculated by BPCL on the average quotes of August, 2017, treating August as the loading month. The justification was that the loading was completed on August 1, 2017 and a single Bill of Lading (B/L) was also generated at the request of HPL

in August, 2017. HPL had made payment on August 18, 2017, on the basis of the split B/Ls which were provisionally raised in July and August, 2017. According to BPCL, the price of the liquid cargo was to be calculated on Free on Board (FOB) basis. The delivery of goods was complete as soon as the cargo was dispatched in the vessel i.e. in August, 2017. HPL made a payment of Rs. 1,07,40,802.96/-. BPCL claimed a further sum of Rs. 10,69,81,787.05/-. The agreement was to remain in force for a period of one year starting from May 1, 2017 to April 30, 2018, for supply of 240 TMT +/- 10% of Naphtha per annum.

4. Clause 18 of the agreement provided that any dispute or difference of any nature whatsoever, any claim, cross-claim or set off or any dispute with regard to rights and liabilities, omission and action of the parties arising out of the agreement, were to be resolved through arbitration. The tribunal would comprise of three arbitrators, one to be appointed by each party and the third arbitrator to be appointed by the two arbitrators in accordance with the Arbitration and Conciliation Act, 1996 (in short 'A & C Act'). The place of the proceedings was agreed to be Kolkata.

5. The case as run by BPCL, in the statement of claim is as hereunder :-

   a. HPL being a naphtha based petro-chemical industry engaged in the production of polymers and chemicals, including linear low density polyethylene, High Density Polyethylene, Polypropelene, Benzene, Butadiene, Cyelopentane, C4 Hydrogenated (LPG), Pyrolysis Gasoline, Carbon Black Feedstock, Motor Spirit, etc., requested BPCL for supply

of one parcel of 20 TMT quantity of Naphtha (LAN) +/- 10%, every month during May 17 to April 2018. The petitioner accepted and an agreement was entered into on May 25, 2017.

b. Clause 5 of the agreement provided that the price of Naphtha would be based on the formula FOB + Market Premium + $5). As per the said clause, average of Naphtha MOPAG (average of platts quotes) for all the quotes during the loading month, would be considered as FOB for any parcel loaded in a month. The market premium would be calculated on the average of Argus Premium and Platts Premium for the period taken for FOB. The exchange rate would be the average available RBI reference rate of US Dollar to Indian Rupee conversion, starting from the pricing date of the first FOB quote, till the last date of FOB quote considered for pricing.

c. The provisional price as per the above formula would be arrived at after taking the average of five quotes prior to the Bill of Lading (B/L) date. Excise invoice would be generated on the basis of the provisional price. The agreement further provided that in case the final billing rate arrived at as per the agreed formula was higher than the rate already billed, a supplementary invoice having the excess element would be issued by BPCL to HPL. In case the final bill arrived at as per the formula was less than the bill already raised, a credit note would be issued by BPCL to HPL. As per clause 6 of the agreement, the vessel engaged for transfer of the cargo from the load Port (Kochi) to the

discharge Port (Haldia), was to be appointed by HPL only upon executing a Charter Agreement with the vessel's owner. All the charges, expenses, losses, damages and claim of any manner with regard to the vessel, were to be borne by HPL.

d. On the basis of the said agreement, HPL placed an order for the month of July, 2017 for supply of 41.8 KT of Naphtha. Accordingly, a vessel named MT Sanmar Sonnet was chartered by HPL, to carry the cargo from Kochi Port to the plant at Haldia. The loading was scheduled during the laycan period of July 27 - July 28, 2017.

e. The vessel reported on July 28, 2017 at 5:30 P.M. at Kochi Port for loading of the product. The vessel could not be berthed on its arrival. The loading of Naphtha could be started on July 29, 2017 at 11:18 A.M. The loading of the entire 41.8 kg Naphtha was completed on August 1, 2017 at 11:36 A.M.. According to BPCL, the time taken was the standard loading time for loading 41.8 kg of Naphtha in a vessel.

f. On completion of the loading, two B/Ls one for the quantity of Naphtha loaded in the month of July and other for the quantity of Naphtha loaded in the month of August, were raised by BPCL.

g. HPL raised objections to the splitting up of the B/L. HPL insisted on one single B/L to be dated as August, 1, 2017. Mr. Suchandan Chatterjee, DGM Commodity Business Team of HPL, by an e-mail had observed that as loading was a continuous process under the SOF, two different dates were not proper. The same would create problems in the

system of HPL and there would be a mismatch. BPCL was requested to change the date of the B/Ls to the loading completion date of August 1, 2017 and to send the revised B/L to HPL, to enable synchronization of the B/L and the invoice.

h. By e-mail dated August 4, 2017, Mr. Raman Shahi, Area Manager Industrial, Kolkata (BPCL), put Mr. Suchandan Chatterjee on notice that, as the loading of the vessel Sanmar Sonnet was completed on August 1, 2017, invoicing had been done on the same date. It was specified in the e-mail that final pricing would be arrived at once BPCL got all the quotes for the month of August, 2017. The factum of provisional pricing of the cargo loaded on Sanmar Sonnet was informed to HPL. HPL disagreed with the provisional pricing, and communicated its own calculation. By an e-mail dated August 10, 2017, an Officer of BPCL explained the provisional pricing calculations that had been provided on the basis of "Around B/L" quotes and not prior quotes. It was explained that final pricing would be arrived at upon taking into consideration all the quotes published in the loading month i.e. August, 2017 and the difference in price / calculations, would be settled through debit or credit notes. Thereafter, BPCL requested payment as per the calculations attached to the e-mail dated August 10, 2017. On the basis of provisional pricing, the claimant raised an invoice for Rs. 1,435,191,955.00.

i. Although, at HPL's request, BPCL prepared a single B/L dated August 1, 2017 i.e. on the date when the loading was completed, but HPL did not pay the final price. The single B/L was handed over to HPL on August 14, 2017. The final invoice was based on the average quotes for the month of August (treating August 2017 as the loading month). HPL made payment on August 18, 2017, on the basis of the two B/Ls. Objections were raised by BPCL by e-mail dated August 30, 2017, to which HPL replied on September 4, 2017, inter alia, contending that the issue was not with regard to a single or a split up B/L, but the enhanced price claimed by BPCL was in deviation to the agreed terms. BPCL contended that the provisional invoice dated August 1, 2017, amounting to Rs.143,51,91,955/- was based on the provisional pricing formula laid down in the agreement for sale and supply of 41.84 kg of Naphtha. Platt's quotes dated July 28, July 31, August 1, 2 and 3 of 2017, were taken into consideration in arriving at the net average price of Naphtha per metric-ton i.e. Rs. 29,067.19/-. The provisional invoice was raised on the basis of such rates. HPL made payment of Rs. 133,29,18,214.93/- on August 18, 2017. As per the agreed terms, the final price was payable to BPCL on the basis of average quotes for the loading month. The final B/L issued by the master of the vessel was dated August 1, 2017. The agreement provided that the provisional bill would be adjusted either by debit or credit notes. The final bill was calculated and one debit note dated August 31, 2017, for the

differential amount of Rs. 66,94,251/- was sent to HPL. HPL made further payment of Rs.1,07,40,802.96/-. Rs. 98,227,188.11/- was due and payable as the principal due, according to BPCL.

j. BPCL had placed the product safely on board and thereby handed over possession of the goods on August 1, 2017. The delivery was complete on August 1, 2017. As the pricing was on FOB basis, the sale got completed once the entire product was free on board. As per clause 8 of the agreement, title of the goods passed from BPCL to HPL at the disconnection of the last permanent flange. In the present case, loading started on July 29, 2017 and the flange was disconnected on August 1, 2017. Final pricing of average quote of August 2017, was taken into consideration by BPCL for claiming the differential amount and generation of the debit note. The debit note was issued in connection with the final pricing for the goods delivered and sold. BPCL, by an Advocate's letter dated November 27, 2017, informed HPL that an amount of Rs, 98,227,188.11/- was due and payable upon the final bill having been raised. The method of calculation as to how BPCL had arrived at the figure of Rs. 98,227,188.11/-, was also provided in the letter. HPL denied such liability to pay and emphasized that the payment had already been made and nothing was due and payable. According to HPL, whether payment was made as per the single B/L or Split B/Ls was a non-issue. BPCL contended that, the provisional invoice considering the date of the Bill of Lading (B/L) as August 1,

2017 was not objected to by HPL. Upon becoming aware of the upward trend in the price of Naphtha in the month of August, 2017 and its impact on the final price of Naphtha loaded on August 1, 2017, HPL changed its mind. According to BPCL, the entire loading of Naphtha was a single transaction and the agreement did not provide for splitting up of invoices. It was BPCL's case that as the entire transaction was one and continuous, the loading month should be considered as one, i.e. the month when the loading was completed. Accordingly, a claim was made for a sum of Rs. 10,69,81,787.05/- in respect of the balance price of Naphtha sold and supplied, along with interest.

6. The calculation of the claim was as follows :-

"A. Principal

| Invoice No. | Date | Invoice Amount | Amount Received |
|---|---|---|---|
| Provisional – 4550013114 | 01.08.17 | 1,435,191,955.00 | 1,332,918,214.93 |
| Debit Memo No 9646950000 | 31.08.17 | 6,694,251.00 | 10,740,802.96 |
| | Total | 1,441,886,206.00 | 1,343,659,017.89 |
| | Balance Principal Amt | 98,227,188.11 | |

B. Interest

| | |
|---|---|
| Principal Amount | 98,227,188.11 |
| Interest @SBI Base Rate (9% till 30 th Sept 2017) + 1%<br>Days (16 – 30 Sept) 15 | 10% |
| Total interest for Sept 2017 | 403673/- |
| Interest @ SBI Base Rate (8.95% from Oct 1st to Dec 2017) +1%<br>Days (1st Oct to 31st Dec 2017) 92. | 9.95% |
| Total Interest for 1st Oct 17 to Dec 17 | 2463484.05 |
| Interest @ SBI Base Rate (8.65% from Oct 1st to Dec 2017) + 1%<br>Days (1st Jan 18 to 31st March 18) 90 | 9.65% |
| Total interest from Jan 18 to Mar 18 | 2337268.84 |

| | |
|---|---|
| Interest @ SBI Base Rate (8.70% from 1st April to Aug 17) +1%<br>Days (1st April 18 to 14 Aug 18) | 9.70% |
| Total interest amount for April 18 to 14th 18 | 3550172.78 |
| Total (Principal + Interest) | 10,69,81,787.05 |

7. The statement of claim was filed before the learned Arbitral Tribunal with the above claim and the following prayers were made:-

a) An Award that the Claimant is entitled to receive an amount of Rs 10,69,81,787.05 from the Respondent as the balance consideration money as pleaded in paragraph 17.
b) Interest on award @ 18% per annum until realization.
c) Costs.
d) Such other or further other order or orders."

8. HPL filed a counter-statement and also made a counter-claim as hereunder :-

"Particulars — Amounts (INR)

| | | |
|---|---|---|
| Claim on account of risk purchase | : | 11,38,35,602 |
| Demurrage claim | : | 46,50,000 |
| Dead freight claim | : | 6,40,000 |
| Excess payment refund claim | : | 2,27,72,651 |
| Principal amount claimed | : | 14,18,98,253 |
| Interest at the rate of 12% per annum on the Principal amount | : | 98,38,208 |
| Total Claim | : | 15,17,36,461" |

9. BPCL filed its rejoinder to the counter statement of facts and the counter-claim filed by HPL. BPCL did not adduce any oral evidence. It was agreed in the fourth sitting dated November 1, 2018, that no oral evidence would be adduced by either of the parties. However, HPL decided to adduce oral evidence and produced two witnesses. Arguments commenced from December 14, 2019. Forty sittings were held and the tribunal made and

published its final award on December 30, 2021. The award was as follows :-

"The Award :

9. In the result -

a) The claim and the counter claim put forth by the claimant BPCL and the respondent HPL respectively, can not be allowed, accordingly, both the claim of BPCL and counter claim of HPL, arising out of the pricing dispute is dismissed.

b) The respondent's counter claim for dead freight is allowed to the extent ie: USD 9985.94 @ the conversion rate as on 05 01 2018.

c) HPL shall also be entitled to interest on the said amount in (b) above after 7 days from 05 01 2018 as specified in paragraph 6.16 and 6.17 hereinbefore till the date of the Award.

d) The respondent's counter claim for demurrage is allowed to the extent as specified in paragraph 7.22 hereinbefore (INR 21,61,476.55 and INR 5,79,338.00);

e) HPL shall be entitled to interest on the above amounts at (d) ie: (i) on INR 21,61,476.55 for MT Jag Prerana after 15 days from the date of the respective original debit note raised after 10.05.2018 (paragraph 7.7 hereinbefore) and (ii) on INR 5,79,338.00 for MT Sanmar Sonnet after 15 days from the date of the respective original debit note raised after 25.04.2019 (paragraph 7.9 hereinbefore), over the respective transactions at the same rate of interest as provided in C1.5, till the date of award.

f) The respondent's counter claim for risk purchase is allowed to the extent as specified in paragraph 8.29 and 8,30 hereinbefore at INR 11,38,35,602.00;

g) The respondent shall be entitled to interest on the above amounts at (f), as provided in C1.5, for the period from 15 days after the date of debit note raised by HPL after 26.04.2018 (the payment date to Saudi Aramco).

h) In the facts and circumstances of the case, no cost is awarded against any of the parties;

i) The Award shall carry interest @7% per annum simple till realization."

10. Mr. Tilak Bose, learned Senior Advocate appearing for BPCL submitted that the dispute had arisen on account of non-payment of the differential price of goods supplied by BPCL. HPL did not ever raise any claim by way of refund or under any other head. As a counter-blast to the claim made by BPCL, the counter-claim had been filed. Mr. Bose contended that even though the scope of interference by a court under section 34 of the A & C Act, 1996 was limited, but the law had permitted the Courts to interfere when an award was either unreasoned or based on extraneous consideration, or when the terms and conditions of the contract were ignored or misinterpreted. According to Mr. Bose, the final price was payable on average quotes for the loading month. The price of cargo was to be calculated on FOB basis i.e. free on board. The delivery of the goods was completed as soon as the dispatch of the vessel was complete on August 1, 2017. The title passed when the flange was disconnected. B/L was issued by the Master of the vessel on August 1, 2017. Even if loading commenced on July 29, 2017, the date of completion of loading would be considered to be the loading month. The B/L for August 1, 2017 was issued at the request of HPL. HPL also understood the loading month to be August, 2017, even though the loading began on July 29, 2017. It was HPL's own understanding that loading was a continuous process and a single B/L for the month of August, 2017 should be initiated. The manner of payment made by HPL was wrongly sustained by the learned Arbitral

Tribunal. HPL made payments of the provisional invoice on the quantities mentioned in the split B/L dated July 29, 2017 and August 1, 2017. In the split B/L dated July 31, 2017, average price for July 2017 had been taken and in the B/L of August 1, 2017, average price of August 2017 had been taken. At the request of HPL, a single B/L dated August 1, 2017 was prepared. E-mails were exchanged between the parties. The Arbitral Tribunal did not appreciate that, as one final B/L was raised at the request of HPL, as a natural corollary to such request, only a single invoice should be prepared on the basis of the average quotes of August 2017. Such was the term in the agreement, which was ignored by the tribunal. The learned Arbitral Tribunal did not appreciate that the provisional invoice was replaced by the final invoice dated August 1, 2017. The tribunal failed to determine the actual meaning of the expression 'loading month'. The calculation of the final invoice was to be made on the basis of the price for the loading month in terms of the contract. The award was based on misinterpretation of the clauses of the contract. The tribunal gave its own interpretation to the terms and conditions of the agreement entered into between the parties. The tribunal had re-written the agreement. The award was liable to be set aside on the ground of perversity and patent illegality.

11. Mr. Bose relied on clause 5 of the agreement in order to support his contention that the price of Naphtha was agreed to be calculated on the basis of the quotes for the loading month and the provisional pricing

would not be final and binding. The contract had made a special provision for raising a final bill and a supplementary invoice. The final billing rate would be in terms of the average quotes of the loading month. In this case, the loading month would be August, 2017, as the loading was completed on that date. Disconnection of the hose took place on August 1, 2017. Parties also understood August 2017 as the loading month, which the tribunal failed to appreciate. Clause 5 of the agreement was relied upon. The relevant portion reads as follows:-

> "5. PRICE:
>
> Naphtha supplies will be made on the pricing based on formulae (FOB+ Market Premium + $5), wherein FOB and Premium shall be worked as below:-
>
> FOB: Average of Naphtha MOPAG (Average of Platts quotes) for all-the-quotes during the loading month (M) will be considered as FOB for any parcel loaded in a month (M)."

12. Clause 7c was relied upon to explain the commencement and conclusion of laytime. It was urged that clause 7c provided that laytime would cease upon disconnection of the hose. Clause 7c reads as follows :-

> "7c. Lay time shall commence 6 hours after NOR (Notice of Readiness) and shall cease upon hose disconnection."

13. Clause 8 of the agreement was relied upon to urge that disconnection of the last permanent flange indicated that the entirety of the cargo had been loaded in the vessel tank. As the supply was on FOB basis, it meant that the supply was completed and the obligation of BPCL was fulfilled

upon the entire cargo being loaded on the vessel on August 1, 2017. Clause 8 reads as follows :-

> "8. Delivery & Risk of Property :
> Title and risk of loss of the cargo (including but not limited to contamination, evaporation, etc.) shall pass from the BPCL (seller) to HPL (buyer) at the disconnection of the last permanent flange at loading terminal."

14. Mr. Bose urged that the definition of FOB in the Agreement, was 'parcel loaded in a month'. It was treated as a unit. The expression 'parcel loaded in a month' should be read in conjunction with the recital of the agreement. The same reads as follows:-

> "Whereas HPL had requested BPCL to supply one parcel of 20 TMT quantity of Naphtha every month".

15. The same meaning was attached to the parcel size of 20,000 MT as would appear in clause 7b of the agreement. Even if the loading of cargo commenced in a particular month and spilled over to the next month, by virtue of clause 8 of the agreement, the title did not pass from BPCL to HPL until disconnection of the last permanent flange. The title passed on August 1, 2017 and the parcel loaded in a month should be the month of disconnection of the hose. Clause 7 b reads as follows :-

> "7b Total Allowed lay time at load port shall be Thirty Six (36) hours for a parcel size of 20,000 MT. Total allowed lay time shall be increased or decreased on prorate basis (SHINC) with actual loading quantity."

16. It was urged that the interpretation given by the tribunal, to the expression 'parcel', as a unit of the cargo supplied, to be taken separately

for the month of July and August, was absurd and would defeat a common sense approach to commercial transactions arising out of FOB contracts. A common man, with a reasonable amount of prudence, would find the reasons assigned by the tribunal and the interpretation of the tribunal, to be shocking. The GST return was calculated by BPCL on the basis of the final pricing and was paid. Once BPCL had altered its position by making such payment on the basis of the final pricing, which was within the knowledge of HPL, HPL was estopped from disputing the final invoice. Reliance was placed on the various communications between the parties in support of the contention that HPL had agreed to make payments as per the final B/L dated August 1, 2017, on the basis of the invoices and the supplementary bill raised. Several documents/letters dated 4.8.2017, 5.8.2017, 10.8.2017, 11.8.2017, 12.8.2017, 14.8.2017, 22.8.2017, 30.8.2017, 4.9.2017 and 5.9.2017 were ignored by the tribunal. The request for a single B/L was to enable HPL to synchronize the B/L with the invoice. HPL had requested for a revised B/L and stated that non-receipt of documents would delay BPCL's payment. The single B/L dated August 1, 2017, was for the entire quantity supplied and prepared at the repeated request of HPL. HPL had asked its agents to facilitate release of a single B/L, to be prepared afresh, for the entire quantity dated August 1, 2017 and to replace the split B/Ls issued earlier. The shipping agent of HPL collected B/L from BPCL's office as per instruction of HPL. BPCL wrote to HPL, inter alia, stating that the

final pricing has been fixed on the quotes for the month of August 2017. BPCL wrote to HPL, stating that the transaction involved GST implications. In spite of providing all the requested relevants documents within August 14, 2017, HPL had made payments on the basis of two split bills without considering that the payment of the GST component was made as per the final bill and the debit note should be honoured. Reference was made to the decision of ***Delhi Metro Rail Corporation Limited vs Delhi Airport Metro Express Private Limited*** reported in ***(2024) 6 SCC 357,*** in support of the contention that the award should be set aside on the ground of non-consideration of vital evidence and specific terms of the agreement.

17. Mr. Bose contended that the claim for differential pricing and the prayer for payment of the deficit amount which was raised in the final invoice, should have been directed by the learned tribunal. The documents relied upon would show that the parties had agreed that in spite of provisional pricing on the basis of five average quotes for the loading month, a final pricing would be made and a final invoice would be raised. The parties were conscious that there would be a differential amount i.e. payment either in excess of or lesser than the provisional pricing which was to be adjusted by debit or credit notes. Such agreement was on the understanding of the fact that quotes could vary from month to month and the pricing was to be made on the average quotes of the loading month, i.e., the month when the hose was disconnected. The learned

tribunal had rewritten the terms of the agreement by interpreting 'parcel' as a single and separate unit for July and August.

18. Mr. Bose then proceeded to address on the illegality and perversity in allowing the counter claims for demurrage, dead freight and risk purchase. With regard to the counter-claim for demurrage, Mr. Bose contended that the vessel used for transfer of the cargo from the load port at Kochi to the discharge port at Haldia, was to be provided by HPL. A charter party agreement was to be executed with the vessel owner. Reference was made to clause 6 of the agreement. It was submitted that as per clause 7, delay in loading would be to the account of BPCL. All subsequent demurrage charges were to be borne by HPL. Clauses 7a and 7c of the agreement were placed.-

> "7a Demurrage (if any) at load port will be on BPCL account.
> 7c Lay time shall commence 6 hours after NOR (Notice of Readiness) and shall cease upon hose disconnection."

19. Clause 7g provided that HPL would provide the vessel owner's demurrage claim and debit note, to prove the final demurrage applicable for the load port. The same was to be provided within 90 days from completion of discharge of cargo. Clause 7g reads as follows :-

> "7g Buyer shall provide vessel owner's demurrage claim, relevant portion of charter party mentioning demurrage PDPR (Per Day Prorate), and debit note from HPL regarding the final demurrage applicable for load port within 90 days of completion of discharge of the cargo. Seller will respond to the claim by acceptance or counter within 15 days of claim failing which the Buyer's claim shall be deemed to have been accepted by Seller

and buyer shall raise debit note accordingly. Seller shall settle the claim within 15 days from date of debit note."

20. HPL had raised a demurrage claim in respect of three vessels, namely, M.T. Jag Prerana (B/L dated 03.06.2017), M.T. Sanmar Sonnet (B/L dated 31.7.2017 and August 1, 2017) and M.T. Sanmar Sonnet (B/L dated 30.9.2017). In respect of M.T. Sanmar Sonnet (B/L dated 31.7.2017 and 1.8.2017), claim for demurrage was disallowed. For M.T. Jag Prerana and M.T. Sanmar Sonnet the counter-claims for demurrage were allowed. Mr. Bose submitted that the basis of the calculation was incorrect as the split B/Ls were replaced by the final B/L dated August 1, 2017. The tribunal wrongly held that losses were suffered at the load port, although there was no evidence before the learned tribunal. The two invoices raised by the shipping company did not specify that the demurrage was on account of the losses suffered at the load port. The finding of the learned tribunal that the demurrage was suffered "admittedly" at the load port was perverse and based on no evidence. The agreement provided that demurrage would be paid by BPCL only if there was delay in loading. Subsequent demurrage charges would be payable by the buyer. Mr. Bose submitted that the required documents as per clause 7(g) were not submitted. Moreover, the claim for demurrage was made much beyond the period of 90 days. Reliance was placed on the decision of ***Ssanyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)*** reported in ***(2019) 15 SCC 131,*** on

the proposition that findings based on no evidence would render the award unsustainable on the ground of patent illegality.

21. With regard to the claim for dead freight, Mr. Bose relied on clause 3 of the agreement and further submitted that dead freight could be allowed if the loss was suffered when the quantity loaded was below the quantity/ volume, nominated by the buyer. The calculation of dead freight would be the difference between actual per Metric Ton freight incurred and the freight cost in case the buyer's nominated quantity had been loaded. Clause 3 reads as follows :-

> "3. DEAD FREIGHT CLAUSE :
>
> Dead freight loss due to quantity loaded blow the cargo volume nominated by the Buyer shall be on Seller's account. It shall be calculated based on the difference between the actual per MT freight incurred and the freight cost in case the buyer's nominated quantity had been loaded. [(Total freight/loaded Qty) (Total freight/Buyer's nominated Qty)] * Loaded Qty.
>
> In case of dead freight loss, if any, HPL shall send a debit note to BPCL, payment of which to be done by BPCL through electronic Transfer within 7 days from the date of issuing of Debit Note. Conversion rate would be as per RBI reference for the pricing period of cargo."

22. There was no evidence which would indicate that loss was sustained by the buyer on account of less cargo being loaded for the relevant month i.e. December 2017. The award itself recorded that the vessel owner had raised a an invoice for a lumpsum freight charge of $ 67.60 as per the e-mail dated December 13, 2017. BPCL had loaded 19971.88 MT. On the basis of such difference, dead freight for 453.12 MT had been calculated.

Such calculation was not permissible because it was a lumpsum freight, and the actual per MT freight could never be worked out. In the case in hand, the actual per MT freight would be the same as freight cost and therefore there would to be no difference. Unless loss was proved, dead freight was not payable. Section 73 and 74 of the Indian Contract Act was relied upon to show that payment for damages could be awarded only if loss had been sustained. Reliance was placed on the decision of the Hon'ble Apex Court in ***Kailash Nath Associate vs. Deuli Development Authority*** reported in ***(2015) 4 SCC 130***.

23. The next submission of Mr. Bose was on the illegality in allowing the counter-claim under the head, risk purchase. According to Mr. Bose, the tribunal had misconstrued the contractual provisions. No man, with reasonable prudence, would have allowed such counter-claim. The claim was *de hors* the provisions of the contract. Allowing such claim was in effect, re-writing the contractual provisions. The tribunal acted in excess of jurisdiction and went beyond the scope of the dispute. Judicial interference under section 34 of the A & C Act was permissible in this case. The tribunal failed to consider the meaning of 'Laycan' which was March 4/5 of 2018. The first date was the earliest when the ship was to be made available. The second date was the date of cancellation, i.e. the date on which the person entrusted with the loading could cancel the agreed 'laycan'. Reliance was placed on the definition of Laycan, Laytime and Notice of Readiness, by referring to the Dictionary of Shipping Terms

(4th Edition) by Peter Brodie, LLP Publication. It was submitted that, if the ship did not arrive, the seller could cancel the laycan. Here, before the ship was brought by the buyer, the cargo offered was cancelled. Clause 19 of the agreement provided that only when the seller failed to comply with the terms and conditions mentioned under clause 6, relating to cargo laycan nomination, the buyer, in addition to taking other legal steps, would be entitled to make risk purchase at the seller's cost. There was no failure on the part of the seller to comply with the terms and conditions mentioned in clause 6. Clause 6 had no manner of application in the facts of the case. The incidence of breach contemplated under the agreement did not arise. No vessel had been nominated and no Charter Party Agreement had been executed by HPL at the relevant point. Although, the goods were offered by the seller for the laycan period, HPL decided to reject such goods and refused to enter into a Charter Party Agreement. No vessel was brought to the load port to enable the seller to load the cargo. Several correspondences were relied upon in support of such contentions.

24. Clause 6 reads as follows:-

> "6. CARGO/LAYCAN NOMINATION:
> The vessel engaged for the transfer of the cargo from load port (Kochi) to the discharge port (Haldia) shall be appointed by HPL only, who shall appoint the said vessel by executing the charter agreement with the vessel owner. All the charges, fee, expense, loss, damage, claim of any manner whatsoever with regard to the said vessel shall be borne by HPL."

25. The tribunal totally ignored such facts. Clause 6 of the agreement contemplated a situation where the buyer was agreeable to purchase

goods to be supplied by the seller and the vessel was arranged. In the instant case, although, the goods were offered by BPCL for the period 3rd to 5th March, 2018, HPL, in its wisdom, decided to reject such goods and refused to enter into a Charter Party Agreement for arrangement of the vessel. No vessel had been brought to the load port to enable the seller to load the cargo. Mr. Bose relied on the e-mails dated 3.2.2018, 5.2.2018 (4 in number), 6.2. 2018 (2 in number), 12.2.2018, 16.2.2018, 20.2.2018 (3 in number), 21.2.2018, 23.2.2018 (3 in number), 24.2.2018, 26.2.2018 (3 in number), 8.3.2018, 15.3.2018, 20.03.2018 and 04.4.2018. Mr. Bose submitted that the alleged purchase of the cargo under the risk purchase clause, was made by HPL in the month of April 2018 i.e. much later than the laycan period. Damages on account of risk purchase could not be permitted if there was no spot purchase during the same laycan period. Moreover, no notice had ever been issued by HPL to the petitioner, regarding invocation of the risk purchase clause on account of the failure of the petitioner to keep its commitment of loading the goods during the laycan period. HPL's document with regard to the risk purchase was fabricated. There was no evidence of risk purchase during the relevant laycan period. The contract contemplated supply of Naphtha by BPCL up to 20 TMT +- 10%. BPCL fulfilled the supply within the stipulated period, i.e., 219 TMT Naphtha by December 2017. Thereafter, by reason of overhauling of its tanks, supply was disrupted. This aspect had not been looked into by the learned tribunal. BPCL could not supply cargo in

January, February, March and April 2018. On account of such non-supply of cargo between January and April, there was no complaint from HPL. Clause 2 of the agreement provided that HPL undertook to purchase a minimum quantity of 20 TMT of Naphtha +/- 10% at buyer's option, every month, during the validity period of the agreement. This could not be treated as a firm commitment on the part of BPCL to supply as per such clause. The failure could not be regarded as a breach. HPL, by its conduct had waived any objection to the non-supply of the cargo between January to April 2018, when the overhauling work was going on. Mr. Bose further submitted that the goods were offered to HPL, but HPL refused on the ground that the specifications of the goods i.e., composition of the various elements of Naphtha, as provided in the agreement, had not been met. According to Mr. Bose, one or two deviations may have occurred, but majority of the parameters had been satisfied. Even the cargo which was offered by the petitioner and rejected by the buyer on February 26, 2018, had met with the contractual specifications. The rejection of the goods by HPL, was contrary to the terms and conditions of the contract. The petitioner offered goods which fulfilled the guaranteed specifications as per annexure 1 of the contract. Such fact was completely ignored by the tribunal and the tribunal relied on random isolated parameters, which were not the guaranteed specifications. The rejection of the goods by the buyer, was a breach of the agreement by the buyer, but the learned tribunal ignored such

breach. Award of damages on account of risk purchase of Naptha from Saudi Aaramco, sometime in 2018, was not covered by the agreement. The quality of the goods purchased from Saudi Aaramco also was not as per the agreed specification. The tribunal did not consider whether the goods purchased from Saudi Aaramco met the guaranteed specifications. Damages on account of risk purchase could be allowed only if similar goods were purchased by HPL during the relevant laycan nomination, on account of the seller not being able to load the goods during the laycan nomination. In the present case, the scenario was completely different. It did not call for award of damages. Such award of damages suffered from perversity. A further vital issue was ignored by the tribunal, inasmuch as, the time to supply the goods under the agreement was extended and by July, 2018, BPCL had supplied an aggregate quantity of 50.613 TMT of Naphtha. The e-mails exchanged between the parties formed vital evidence in this regard, which the learned tribunal had chosen to ignore.

26. Mr. Sabyasachi Chowdhury, learned Senior Advocate appearing for HPL submitted that the views taken by the learned tribunal were possible views and not open to challenge before this court. The tribunal had interpreted the terms and conditions of the contract, the clauses thereof and held that some of the counter-claims of HPL were justified. The tribunal supplied the reasons. The first claim of HPL for refund on account of differential pricing was rejected on the ground that HPL had paid the money as raised by the provisional invoice. Calculation of the

price for the month of July, 2017 and August, 2017 were made separately in the invoice. The parties understood that the pricing would be considered as per the respective loading months. Thus, it was the finding of the tribunal that the 'parcel of goods' in this case would be the unit loaded in each month i.e. July and August. Mr. Chowdhury submitted that the learned tribunal, thus, rejected the claim of HPL. The contract provided that the payment would be made as per the quotes for the month of July, 2017. The tribunal proceeded on the conduct of the parties. The laycan period as per clause 6 was narrowed down to July 27, 2017 and July 28, 2017. Mr. Chowdhury submitted that HPL chose not to challenge such finding as the tribunal's interpretation of the clauses were based on how the parties understood and treated the terms and conditions with regard to pricing. The tribunal was the master of facts and of the quality of evidence. The conclusion of the learned tribunal on this score should not be interfered with, even if an alternative view on the interpretation of clause 5 of the said agreement was possible. The formula arrived at by the tribunal was on the interpretation of the expression 'loading month' which was taken subsequently as July, 2017 and August, 2017, and as such, the quantum of goods loaded in July and August were treated to be separate parcels. It was contended that passing of the title of the goods would not affect the price of the same or vice versa. The intention of the parties to the contract was the key to determine what actually transpired between them. The interpretation given by BPCL that

the title would pass only on August 1, 2017, upon disconnection of the last permanent flange at the loading terminal and the final price should be based on the average quotes of August 2017, would permit BPCL to take advantage of its own delay in loading the vessel. Admittedly, the vessel could not berth on July 28, 2017, due to congestion in the load port and the vessel berthed on July 29, 2017 at 9 hours, when the loading commenced. The price at which the goods were to be sold was to be determined solely on the basis of the contract between the buyer and the seller of such goods. The passing of the title of the goods would not affect the price of the same. Clause 5 clearly provided the manner in which the price of the goods would be ascertained. Thus, the date on which the title had passed from BPCL to HPL was not relevant in the instant case.

27. It was submitted that HPL had claimed demurrage on three counts. First in respect of M.T. Jag Prerana (B/L dated 3.6.2017), second in respect of M.T. Sanmar Sonnet (B/L dated 31.7.2017 and 1.8.2017) and the third in respect of M.T. Sanmar Sonnet (B/L dated 30.9.2017). HPL had urged that the demurrage claimed was on pre-estimate of the loss expected to be suffered by HPL on account of failure by the seller and the claim of HPL was not restricted to the actual loss suffered by them. The learned tribunal did not accept such contention, but followed the principle that one could be indemnified to the extent one had been damnified. The tribunal only allowed the counter-claim of HPL on account of the

demurrage to the extent of the amount which was paid to the vessel owner by HPL. BPCL had admitted that demurrage was payable to HPL. Such admission was available from the e-mail dated September, 16, 2018. HPL had provided calculations for the demurrage hours. The submission of BPCL that the delay was on account of the force majeure event, was held to be contrary to the force majeure clause under clause 17 of the agreement. Similarly, while awarding the counter-claim of HPL on account of dead freight, the learned tribunal followed the same principle. By the e-mail dated January 22, 2018, BPCL had admitted the claim of HPL on account of the dead freight. Once BPCL sought waiver of dead freight, the liability to pay the same was admitted. The formula in clause 3 of the agreement had been duly applied in consonance with the calculations of proportionate dead freight. With regard to the claim on account of the risk purchase, Mr. Chowdhury submitted that from the contemporaneous correspondence, it would be evident that clause 19 of the agreement had been breached by BPCL. The e-mail dated February 3, 2018, would clearly indicate that Naphtha was not available as BPCL had already exported the same. Therefore, HPL requested for a confirmation of availability of Naphtha for the month of March 2018. By an e-mail dated February 5, 2017, HPL recorded BPCL's confirmation of availability of 20 KT of cargo. By a subsequent email of February 5, 2018, BPCL confirmed that they would provide 30 KT Naphtha during March 4 and 5 2018. BPCL requested for acceptance of the cargo by HPL. By an e-mail dated

February 6, 2018, HPL confirmed lifting of 30 KMT Naphtha during 4th and 5th March, 2018. By an e-mail dated February 12, 2018, HPL requested BPCL for availability of cargo for the month of April, 2018. BPCL responded to the e-mail on February 15, 2018, to the effect that BPCL would be in a position to offer 35 KT Naphtha in the month of April, 2018. By the said e-mails, BPCL confirmed that since the parties would be completing the MoU, the cargo for April 2018 would be dispatched under the new MoU terms only. In respect of the cargo scheduled for 4th and 5th March, 2018, BPCL shared quality parameters by their e-mail dated February 16, 2018. By an e-mail dated February 16, 2018, HPL informed BPCL that the specifications shared by BPCL, differed from contractual specifications. However, as a special case and without creating a precedence, HPL was agreeable to accept the cargo by deviating from the contractual specifications. By an e-mail dated February 20, 2018, the quality parameters of certified batches were shared by BPCL with HPL. It would be evident from a subsequent e-mail of HPL dated February 20, 2018, that the parameters of the cargo shared by BPCL on February 20, 2018 was of further inferior quality. By the said e-mail, it was clearly communicated by HPL to BPCL that, further deterioration of the quality would cause immense inconvenience to HPL and HPL would have to take up the matter with their plant. From the e-mail dated February 21, 2018, sent by BPCL, it would be evident that there was an admission with regard to the inferior quality of Naphtha. Similarly, the e-

mail sent by BPCL on February 23, 2018, requesting HPL to accept such inferior quality of cargo, itself, would prove that the quality of cargo proposed to be supplied by BPCL or as was available with BPCL, was of low quality. That itself was a breach. HPL had expressed displeasure when BPCL had deviated from the accepted specifications. By an e-mail dated February 26, 2018, BPCL shared the test result of the product planned for loading on 4th and 5th March, 2018. HPL rejected the cargo saying that the same did not even meet the parameters which were accepted by it, upon deviating from the original parameters. By an e-mail dated March 8, 2018, HPL requested BPCL to advise on the next laycan for supply of cargo as per the contractual specifications. BPCL however did not respond to the said e-mail. By letters dated March 17th and 18th 2018, HPL informed BPCL that it had no other way of procuring Naphtha and was compelled to opt for risk purchase, to ensure fleet security. BPCL had failed to supply the agreed quantity of Naphtha upon meeting the contractual specifications. Several opportunities were given to BPCL to meet the quality of Naphtha and share the test results of the same to enable HPL to ascertain whether the quality of Naphtha that was proposed to be loaded, at least met some of the specifications. The respondent had rejected the cargo as the test results were much below the standard quality and the deviation was not accepted. Continuous supply of Naphtha was mandatory and there was no other option, but to go for risk purchase. The contention of Mr. Bose that only when the vessel

was sent by HPL, clause 6 could be invoked, was not acceptable. The parties were negotiating on the quality of Naphtha to be supplied. The supply in July 2018 was independent and was not an extension of the agreement. BPCL offered to supply 35 KT of Naphtha with the laycan of 19-20th July. By email dated June 21, 2018, upon ascertaining the quality parameters, HPL confirmed the deal on independent terms and conditions, which inter alia, included pricing period and loading month average. BPCL admitted that the subject agreement was valid only upto April 30, 2018.

28. The question of the respondent entering into a Charter Party Agreement and sending a vessel for loading did not arise. The respondent was already aware that the quality of goods proposed to be loaded was not up to the mark. There was no reason why the respondent would be under an obligation to accept low quality goods when the parameters had been specifically stated in the annexure to the contract. There was a default on the part of BPCL to supply the required quantity of Naphtha with the required specifications, and as such, the risk was justified. The date of the risk purchase was not relevant. A comparative analysis of the parameters of the goods purchased from Saudi Aaramco with what was proposed to be supplied by BPCL, would show that the quality offered by Saudi Aaramco was comparatively closer to the agreed specifications. According to Mr. Chowdhury, the scope of interference of a Court under section 34 of the A & C Act is extremely limited and he submitted that the

application should be dismissed. Reliance was placed on the decision of ***OPG Power Generation Private Limited vs. Enexio Power Cooling Solutions India Private Limited and Another*** reported in ***2024 SCC OnLine SC 2600***.

29. Considered the submissions of the respective parties. Recourse against an arbitral award is provided under chapter VII of the A & C Act, Section 34 deals with an application for setting aside an award. The same is quoted below:-

> "34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
> (2) An arbitral award may be set aside by the Court only if—
> (a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—
> (i) a party was under some incapacity, or
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such

agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to

take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

30. The award has been challenged on the grounds of non-consideration of material evidence, non-supply of reasons, conclusions based on surmise and conjecture, the tribunal rewriting the terms and condition of the contract etc. According to BPCL, the tribunal had given its own interpretation of the relevant clauses of the contract, while refusing the prayer for payment of the differential price as per the final invoice. The expression 'parcel' was misconstrued. The interpretation given by the tribunal was incomprehensible and shocking to the conscience of a reasonable man. The tribunal had made out a third case. Further contention was that the counter claims of the respondent, apart from the prayer for refund, were wrongly awarded, without taking into account the relevant clauses of the contract. The clauses of the agreement had to be strictly construed. The tribunal gave a liberal and equitable meaning to the clauses relating to demurrage, dead freight and risk purchase.

31. The issues to be decided in this application are whether the arbitral award is in conflict with the public policy of India or/and is vitiated by

patent illegality apparent on the face of the award. Section 34(2)(v)(b)(ii) provides that, when a court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award. Explanation -I thereto provides that an award will be in conflict with the public policy of India only if it is in contravention with the fundamental policy of Indian law or it is in conflict with the most basic notions of morality or justice. The first ground under Explanation - I is not relevant as it is nobody's case that the making of the award was affected by fraud or corruption or was in violation of Section 75 or 81. Explanation -2 clarifies that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Explanation 2A provides that an arbitral award arising out of the arbitrations other than International Commercial Arbitrations may be set aside by Court if the Court finds the award is vitiated by patent illegality appearing on the face of the award. . Thus, the award in the instant case has to be scrutinized within the limitation of the law which permits setting aside of an award i.e. whether the award is either in contravention of the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice or is patently illegal.

32. In this case, the Arbitral Tribunal considered the background of the dispute which led to the reference. The tribunal dealt with the claim and thereafter the counter-claims, in a phased manner.

33. First, the tribunal dealt with the claim and counter claim relating to the differential pricing (pricing dispute) for sale and supply of Naphtha during the loading i.e., July 29, 2017 and August 1, 2017. In order to appreciate the claim based on the final invoice and counter-claim for refund of excess payment in respect of the said loading period, the tribunal referred to clauses 5, 6, 7 and 8 of the contract, which were also relied upon by Mr. Bose in support of the claim for the differential pricing as per the final invoice.

34. The learned tribunal applied the above clause to the balance claim of the petitioner and the counter claim for refund, i.e., the pricing dispute between the parties. It was observed that the supply was for the month of July, 2017. The laycan was narrowed down to July 27, 2017 and July 28, 2017. Such laycan period was accepted by both the parties. The notice of readiness was issued on 28th July, 2017 at 17:30 hrs. Accordingly, the lay time commenced from 23:30 hrs. of July 28, 2017 as per clause 7(c). Due to congestion at the port, berthing was delayed and the vessel berthed at 9:00 hrs. on July 29, 2017. The loading commenced at 11:18 hrs. on July 29, 2017. The contractual lay time of 72 hrs. ended at 23:30 hrs. of July 31, 2017. According to BPCL, the laycan actually ended by 02:45 hrs. on August 1, 2017. The loading was completed at 11:36 hrs. of August 1, 2017. The hose was disconnected at 12:20 hrs. of August 1, 2017. The tribunal recorded that delay in loading the cargo was an admitted position. Berthing of the vessel was delayed due to congestion in the load

Port and because high capacity pumps were not available to load the cargo. Such observations of the learned tribunal were based on a communication dated August 31, 2017 from an officer of BPCL to an officer of HPL. Paragraph 2 of the said e-mail is significant. The said paragraph is quoted below:-

> " 2. The loading started at 1118 Hrs on 29th Jul'17 and completed at 1136 Hrs on 1st Aug' 17. This is within the standard loading time of 72 Hrs that requires to load 40KT in a vessel. However, the loading took this much time due to non-availability of high capacity pump on account of technical issues."

35. In the above background, the claim was considered. BPCL raised two bills of lading (B/L), one for 33968.155 MT, being quantity loaded in the month of July, 2017 and the other for 7875.049 MT which was the quantity loaded on August 1, 2017. A provisional invoice for the total cargo loaded was raised on the split B/L. HPL requested for one B/L and BPCL replaced the two B/Ls. HPL disputed the provisional bills on the ground that the average of prior 5 days quotes had not been properly taken. However, HPL made its own calculation and made its payment. Subsequently, BPCL raised a debit note for the final bill for 41483.204 MT, i.e., the total quantity loaded in July and August taken together, on the basis of the average quotes during the month of August 2017. HPL disputed the same on the ground that the pricing should be on the average quotes during the month of July, 2017 i.e. the originally agreed laycan period. However, HPL paid on the basis of its own calculation

based on the July 2017 quotes, for 33968.155 MT and August 2017 quotes, for 7875.049 MT. The manner of payment/calculation by HPL was available in annexure R1 to the annexures of the counter statement.

36. BPCL's claim for the difference in price paid by HPL and the price quoted on the basis of average quotes during the month of August, 2017 together with interest, were rejected by the learned tribunal. The submissions of learned counsel for BPCL, the documents available before the tribunal and the tribunal's understanding and construction of the provisions of the agreement and how the parties understood the contract, were taken into account. It was held that the meaning and import of the expression "loading month" in clause 5 of the agreement was unambiguous. FOB was explained in Clause 5. The average of Naphtha for all the quotes during the loading month was to be considered as FOB for any parcel loaded in a month. According to the learned tribunal "any parcel loaded in a month" was to be given its plain, simple and ordinary meaning. The phrase should not be rendered either redundant or otiose. It should be construed harmoniously with the other provisions. The tribunal held that there was no special context to hold the loading month to be August, 2017. Rather, the loading month should be partly July 2017 and partly August 2017, as per the quantum loaded in each of those months. The expression "any" before the word "parcel" and the article "a" before the word "month" was significant and indicative. The expressions "any" and "parcel", would mean that each cluster of cargo or unit of cargo loaded in

the particular month would be treated as a separate parcel or unit and a part of the whole of the cargo loaded in the months of July and August. The expression should be read as "any parcel in a month" meaning thereby the parcel of Naphtha loaded in July would be treated as one unit and the parcel of Naphtha loaded in August would be treated as a separate unit and the prices should be calculated on the prior five quotes of July, for the parcel of goods of cargo loaded in the month of July and similarly on the prior five quotes of August, for the quantity of cargo loaded in August 2017. The definition of the expression "parcel" was adopted from the shorter Oxford English Dictionary, which meant a part of anything, considered separately as a unit, a similar portion or particle, a component, part of something, something included in a whole. In this context clause 5 is quoted below:-

> "5. PRICE:
>
> Naphtha supplies will be made on the pricing based on formulae (FOB+ Market Premium + $5), wherein FOB and Premium shall be worked as below:
>
> - FOB: Average of Naphtha MOPAG (Average of Platts quotes) for all-the-quotes during the loading month (M) will be considered as FOB for any parcel loaded in a month (M)"

37. According to the tribunal, the expression "parcel" had been used in the contract to signify a quantity. Clause 7(b) was referred to. The same is quoted below:-

> "7(b) Total Allowed lay time at load port shall be Thirty Six (36) hours for a parcel size of 20,000 MT. Total allowed lay time shall be

increased or decreased on prorate basis (SHINC) with actual loading quantity."

38. It was held that the parcel could be any quantity qualified by size or qualified by the time of loading i.e. any parcel loaded in a month. According to the learned tribunal, the communication between the parties clearly indicated that HPL was agreeable to the price based on the average quotes for the month of July, in respect of the parcel loaded in the month of July and on the average quotes for the month of August, 2017 for the parcel loaded in the month of August, 2017. In fact, HPL made payment against the provisional invoice. BPCL insisted on average quotes for the month of August, 2017. The contention of HPL was that the loading month should be construed on the basis of the laycan month i.e. July. The tribunal rejected the claims of both parties for the simple reason that, the meaning of "loading month" and "loading laycan" were different as would appear from clause 6b. Clause 6b is quoted below:-

> "6b By the 1st of M-1(where M = loading Month) buyer shall nominate the 5 days loading Laycan within the 15 day laycan as agreed above which seller to confirm within 2 days of receipt of HPL's proposed laycan. In case seller is unable to accept the 5 day loading laycan as proposed by HPL, within 2 days of receipt of HPL's proposed laycan. Seller may propose alternate laycan with a maximum deviation of +/- 2 days from the Buyer's proposed laycan."

39. Laycan was the period within which the vessel had to report. The reporting of the vessel depended on the terms of the charter party contract between HPL and the vessel owner. BPCL was not a party to the

same. What was agreed between BPCL and HPL were the days of the laycan in the loading month. Those two days of the laycan were the period within which the vessel had to report and notify its readiness. Therefore, according to the tribunal, the loading month should be given the meaning as it appeared from clause 5 i.e., for any parcel loaded in a month. There was neither inconsistency nor ambiguity in the expression "loading month" in clauses 5 and 6, as per the understanding of the learned tribunal. The said expression had nothing to do with the laycan period. Therefore, according to the learned tribunal, the average quotes of any parcel loaded in a particular month would be the price of the cargo for that month. Therefore, the quantity loaded within July 31, 2017 would be a separate and distinct parcel from the quantity of cargo loaded on August 1, 2017. The arguments of BPCL and HPL were turned down. The tribunal was of the opinion that, disconnection of the last permanent flange was relevant for passing of title and risk, which had nothing to do with the pricing.

40. Section 9 of the Sale of Goods Act, 1930 was considered. It was held that the price had been fixed in terms of clause 5 and had to be determined on the basis of the said clause, namely, FOB for any parcel loaded in a month. Section 9 of the Act of 1930 provided that the price in a contract of sale could be fixed by the contract or may be left to be fixed in a manner which would be agreed to or determined in the course of dealings between the parties. In the present case, the price had been fixed in terms

of clause 5 and it had been determined on the basis of the said clause. HPL's contentions with reference to the clause to show that laycan had been fixed earlier, and pertained to the month of July, were not considered relevant for the purpose of deciding whether the counter-claim of HPL under the head 'differential pricing' should be allowed or not. According to the tribunal, price was to be determined on the interpretation of clause 5, which was independent of other clauses. Clause 6 was a guideline for laycan, narrowed down to loading laycan, whereas, clause 7 dealt with demurrage and clause 8 dealt with passing of title and risk. Each of those clauses were held to be independent of each other and according to the tribunal, the clauses did not suffer from any ambiguity. The tribunal found that it was not necessary to look for any other clause to interpret the meaning of the expression "loading month". The meaning of the expression "loading month", was absolutely clear and unambiguous under clause 5. The decisions cited by the parties were also considered. It was found that there was no repugnancy in the expression "loading month" used in clause 5, with the other clauses, when the subject or context was pricing. The tribunal, while negating BPCL'S claim held that, how both the parties understood the contract was reflected by their conduct, inasmuch as, BPCL issued two separate B/Ls for two parcels, followed by the provisional bill, thereby, pricing the two parcels separately. HPL made the payment based on average quotes of July 2017 for the parcel loaded in July and average quotes of August 2017 for the

parcel loaded in August. As a result, the claim of BPCL for further amount as per the single B/L and the HPL's claim for refund of excess payment made for the quotes of August, were both rejected. Findings of the learned tribunal are based on the tribunal's understanding and construction of the contract and the way the parties understood clause 5. The Tribunal is the master of facts. The construction of the contract must be left to the tribunal. The scope of interference of the Court under section 34 of the A & C Act is limited. The Court cannot re-appreciate the evidence. The view of the tribunal is a possible view. The tribunal's interpretation of the clauses, as have been discussed hereinabove, do not appear to be either patently illegal or bereft of reasons. According to the tribunal, when the parties by their conduct had displayed that they had treated each of the parcels of cargo loaded in July and August separately, and calculation was made in the provisional invoice on the average quotes of July and August separately, payments were also made as per the calculation of HPL on the average quotes of July and August separately, they could not turn around and claim something which was contrary to what they had accepted by their conduct. Although, it has been urged before this court that the GST payment was based on the calculation in the final invoice, the petitioner had altered its position by making such payment, and thus the respondent was estopped from challenging the validity of the differential price claimed on the basis of the final invoice, such case has not been made out in the statement of claim and there are

no pleadings to that effect. Thus, this Court does not find any reason to interfere with the decision of the learned tribunal on the first issue.

41. Reference is made to the decision of ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,*** reported in ***(2016) 4 SCC 126*** , the Hon'ble Apex Court held as follows:-

> "10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement."

42. In the matter of ***M/s Hindustan Construction Company Limited vs M/s National Highways Authority of India,*** **reported in 2023 INSC 768**, the Hon'ble Apex Court held as follows:-

> "23. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of UP v Allied Constructions17: "[..] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see M/s. Sudarsan Trading Co. v. The Government of Kerala, AIR (1989) SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the. interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law"
>
> 24. This enunciation has been endorsed in several cases (Ref McDermott International Inc. v. Burn Standard Co. Ltd18). In MSK Projects (I) (JV) Ltd v State of Rajasthan19 it was held that an error in interpretation of a contract by an arbitrator is "an error within his jurisdiction". The position was spelt out even more clearly in Associate Builders (supra), where the court said that: "[..] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the

contract in such a way that it could be said to be something that no fair minded or reasonable person could do."

43. In the matter of ***McDermott International Inc. v. Burn Standard Co. Ltd.,*** reported in ***(2006) 11 SCC 181,*** the Hon'ble Apex Court held as follows:-

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd.* v. *ONGC* [(2003) 8 SCC 593] and *D.D. Sharma* v. *Union of India* [(2004) 5 SCC 325] .)
>
> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In the matter of ***Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission,*** reported in **(2003) 8 SCC 593,** the Hon'ble Apex Court held as follows:-

> "29. In *State of U.P.* v. *Allied Constructions* [(2003) 7 SCC 396 : (2003) 6 Scale 265] this Court held: (SCC p. 398, para 4)
>
> "Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co.* v. *Govt. of Kerala* [(1989) 2 SCC 38

: AIR 1989 SC 890] ). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering."

45. The next issue decided was the counter-claim under the head dead freight. The learned tribunal considered clauses 2 and 3 of the agreement. The clauses are quoted below:-

"2. QUANTITY :

BPCI, shall-supply from Kochi refinery and HPL undertakes to purchase a minimum quantity of 20 TMT of Naphtha +/- 10% at Buyer's option every month during the validity period of the agreement.

In case of an additional requirement of Naphtha quantity in any month, the same will be decided on mutual consent of BPCL and HPL. Loading of such quantity shall be governed by all the terms of this agreement.

3. DEAD FREIGHT CLAUSE:

Dead freight loss due to quantity loaded below the cargo volume nominated by the Buyer shall be on Seller's account. It shall be calculated based on the difference between the actual per MT freight incurred and the freight cost in case the buyer's nominated quantity

had been loaded. (Total freight/loaded qty) - (Total freight/Buyer's nominated Qty * Loaded Qty

In case of dead freight loss, if any, HPL shall send a debit note to BPCL, payment of which to be done by BPCL through Electronic Transfer within 7 days from the date of issuing of Debit Note. Conversion rate would be as per RBI reference for the pricing period of cargo."

46. Clause 2 provided that BPCL would supply from Kochi refinery and HPL undertook to purchase minimum quantity of 20 TMT of Naphtha +/-10%, at the buyers option, every month, during the validity period of the agreement. In case of additional requirement of Naphtha in any month, the same would be decided on mutual consent of BPCL and HPL. The loading of such quantity would be governed by all the terms and conditions of the agreement. The dead freight clause provided that loss suffered due to quantity of cargo loaded below the agreed volume nominated by the buyer, would be on the seller's account. It would be calculated based on the difference of rate between the actual per metric ton freight incurred and the freight cost in case the buyer's nominated quantity had been loaded i.e. [(total freight / loaded quantity), (the total freight/buyer's nominated quantity x loaded quantity)]. In case of dead freight loss, if any, HPL would issue a debit note to BPCL and payment would be done by BPCL by electronic transfer within 7 days from the date of issuance of the debit note. Conversion rate would be as per RBI's reference for the pricing period of cargo. The tribunal came to the finding that the loss was suffered by the seller due to loading of lesser quantity of cargo than what was nominated by the buyer and should be borne by the seller. In the present case, the claim

for dead freight was not in dispute. The claim for dead freight was in respect of the voyage of M.T. Jag Padma (B/L dated December 03.12.2017). HPL was bound to purchase a minimum quantity of 20 TMT of Naphtha +/- 10% every month during the validity period of the agreement. In case of M.T. Jag Padma, HPL sent an e-mail to BPCL on October 28, 2017 stating that it had planned for 20 TMT +/- 10% of Naphtha during end of November, 2017. Another e-mail was sent on December 2, 2017 to the vessel owner initially declaring the final loadable quantity of subject vessel as 20350 MT, stating that the owner would try to load close to 20500 MT on best endeavour. Accordingly, HPL declared a loadable quantity of 20350 MT. Question No. 338, which was put to RW1, was referred to in this context by the learned tribunal. The evidence referred to by the tribunal indicated that at 13:03 hrs. on December 2, 2017, the Master of vessel M.T Jag Padma sent an e-mail stating "message well received. As instructed, Vessel will load to 7.60M FW Draft,. arrival Haldia … Vessel makes loadable for 7.60M FW draft – 20425 MT". The said e-mail was part of the annexureS to the counter-statement. Question nos. 341 to 346 and 350 of the Cross-examination of RW1 were referred to. It was found that the vessel owner raised an invoice for lump sum freight charges for the above quantity, amounting to $477067.50. Reference was made to the Affidavit of Evidence of RW2. BPCL loaded 19971.88 MT. According to the tribunal, dead freight was charged for the less amount loaded i.e., 453.12 MT. The short loading was found to be lower than the margin of +/- 10% of 20 KT. HPL raised a claim for

dead freight by an e-mail dated January 5, 2018 and in reply BPCL did not contradict any of the facts relating to the claim. BPCL stated as follows :-

> "At various times BPCL has accommodated the last moment request (towards loading completion) for increasing the quantity nominated earlier. This has been done in the spirit of reducing your dead freight, as we were having product with us and there was scope of further loading in your vessel. Keeping the same spirit in mind, we would request you to kindly not consider the difference in quantity of the subject cargo, which is well within the range of 20KT +- 10% for dead freight claims."

47. The above facts were available from the documents at pages 144-145 of the annexures to the counter statement. The contention of HPL was that the quantity nominated by HPL by an e-mail dated October 28, 2017, through the Master of vessel, was 20425 MT. The same was well within the extra 2 KT of Naphtha. HPL had the option to nominate such amount as per clause 2 of the agreement. BPCL admitted the loading of 19971.88 MT of Naphtha. Thus, the tribunal held that HPL was entitled to dead freight.

48. The question which the tribunal decided under the said head was whether having regard to the provision of the contract, dead freight would be payable and the learned tribunal came to the finding that despite the margin of +/- 10% specified in clause 2, nothing had been mentioned about the range of +/- 10% in clause 3. It only indicated that dead freight loss due to quantity loaded below the agreed volume nominated by the buyer, would be on the seller's account. Therefore, as per the understanding of the learned tribunal, BPCL having loaded lesser quantity of cargo than what was nominated by the buyer, was liable to pay the dead freight. The tribunal observed that the

contract must be construed strictly. The reference to the margin of 10% +/- in clause 2, was conspicuously absent in clause 3. The tribunal opined that the omission seemed to be deliberate. Both the parties were prudent commercial entities, having in-depth experience in trade and commerce with intelligent advice available to them. The tribunal held that it was not required to supply the omission in the language used in the contract in such context. The terms in clause 2 and 3 were the real reflection of the intention of the parties. Thus, BPCL's contention that the quantity supplied was within the margin of +/-10% was not accepted by the tribunal, upon interpretation of clause 3. Clause 2 prescribed the accountability of BPCL to supply the quantity nominated by buyer, at the option of the buyer. The buyer had the option to nominate any quantity equal to 10% +/- of 20TMT. The seller was obligated to supply the quantity nominated by the buyer. Thus, according to the tribunal, Clause 3 made BPCL liable for dead freight loss, on account of loading of less quantity of cargo. The margin of +/- 10% of 20 TMT, could not be taken advantage of by BPCL, when the quantity mentioned was at the option of HPL. This was the finding of the learned tribunal and this Court does not find either any illegality or unreasonableness in such finding. The findings are based on the interpretation of the clauses, evidence of RW1 and RW2, the communication between the parties and the communication of the vessel owner. The learned tribunal came to a finding that the ultimate effect of the two clauses i.e. clause 2 and 3, were not in dispute. The intention of the parties were clear and would manifest from the reply dated January 8, 2018, when BPCL requested HPL to

waive the claim. There was nothing on record to show that BPCL had ever disputed the claim or dealt with the same except in the e-mail dated January 8, 2018. BPCL's supply of 19971.88 MT against HPL's nomination of 20425 MT, was not in dispute and the dead freight claim was equivalent to 6.4 lakhs. HPL's calculation based on the formula at clause 3, was not accepted. According to the learned tribunal, HPL could not claim anything more than USD 9985.94 with interest. The findings are at paragraph 6.17 of the award.

> "In the counter claim raised, HPL gave its calculation based on the formula provided in Cl.3 of the agreement. It pointed out as below: Vessel freight as per B/L USD 454350/19971.88 MT = USD 22.74/MT. Vessel freight as per HPL nominated quantity USD 454350/20245MT = USD 22.24.
>
> Dead freight : USD (22.74-22.24) x 19971.88 MT= USD 10079.56. But we find that the figures USD 22.74-22.24 calculates to USD 0.5.
> and loaded cargo 19971.88 x USD 0.5 works out to USD 9985.94.
> Therefore HPL cannot claim anything more than USD 9985.94 ie: for INR equivalent at the conversion rate as on 05 01 2018."

49. The next head of the counter claim was for demurrage. The same was claimed on three counts. First claim was in respect of MT Jag Prerana (B/L dated 03.06.2017), second was in respect of M.T. Sanmar Sonnet (B/L dated 31.07.2017 and 01.08.2017) and the third was in respect of M.T. Sanmar Sonnet (B/L dated 30.09.2017). The learned tribunal relied on the submissions of the parties and deemed it fit to look into the documents in support of the demurrage claim of HPL. The tribunal's finding was based upon consideration of respective documents relating to NOR and the Statement of Fact submitted by the vessel owner. The Statement of Fact and NOR were not in dispute. The

tribunal found that details relating to NOR, commencement of loading, completion of loading , disconnection of the flange, berthing and release of moorings were all available. All those documents were certified by the vessel owner.

50. In respect of M.T. Jag Prerana (B/L dated 03.06.2017), the tribunal held that although the demurrage hours at the load port were shown to have been for 57.9 hrs. and the PDPR at 666.667, BPCL admitted 54.4 hrs. of demurrage. HPL claimed demurrage on the basis of 58.22 hrs. From the different correspondences exchanged, it was found that the vessel owner filed a claim against HPL for 49.41 hrs. Such claim was available from the affidavit of evidence of RW2. It was found that the vessel owner had reduced its claim further to a total $33580.65 by an e-mail dated April 16, 2018, after deducting TDS, which came to Rs. 21,61,476.55/. The evidence of RW2 was relied upon. Such amount was found payable by BPCL.

51. In respect of M.T. Sanmar Sonnet (B/L dated 31.07.2017), it was found by the learned tribunal that free lay time, demurrage rate, the events relating to NOR commencement of lay time, cessation on free lay time and disconnection of hose, were all admitted. BPCL admitted demurrage hours of 5 hrs. 17 minutes amounting to $4290, whereas HPL claimed $7732.29. It was found that the vessel owner did not claim any demurrage taking into account the lay time at the load port and discharge port. Thus, nothing was found payable in respect of the said B/L.

52. In respect of M.T. Sanmar Sonnet B/L dated 30.09.2017, the learned tribunal found that free lay time, demurrage rate, notice of reduction, commencement of lay time, cessation of free lay time and the hose disconnection, were all admitted. The demurrage hour at the load port was 21.30 hours and the demurrage rate was $ 812.5, which amounted to $ 17468.75. The vessel owner filed a claim against HPL by an e-mail dated November 9, 2017, for a total of 10 hrs. 37 minutes and claimed $ 8626.04. The evidence of RW2 and annexure C of BPCL's annexure to the rejoinder to such claim were considered. Exhibit R11 i.e. the e-mail of BPCL dated September 16, 2018, was duly considered. The e-mail stated as follows :-

> "Due to sunken boat in the channel, CPT did not grant the Pilot for berthing / sailing for all tankers during this period … Thus claim falls under force majeure clause and hence there is Nil demurrage."

53. The arguments of the learned counsel for BPCL were considered. BPCL argued that the force majeure clause should be invoked in this case. Due to unexpected circumstances, the delay had occurred. The learned tribunal considered the document and came to the finding that BPCL had requested HPL to waive the demurrage claim. Therefore, BPCL could not dispute liability for demurrage by applying the force majeure clause. Clause 17 of the agreement was considered. The same is quoted below :-

> "17. FORCE MAJEURE CLAUSE:
> If either of the parties to the contract is impended in abiding by the contract terms by any circumstances of Force Majeure as hereunder defined then the party who is impeded shall within seven days give notice in writing to the other party together with evidence relied upon for the

same and will agree postponement of the date of completion as may be in all circumstances be considered reasonable.

For the purpose of this contract, Force Majeure shall mean and be limited to the following:

a) Any war, invasion, act of foreign enemies, rebellion or Hostilities

b) Any riot or civil commotion

c) Any Acts of God such as severe earthquake, typhoon or Cyclone, flood, tempest, epidemic or other natural physical disasters

d) Any accident, fire or explosion

e) Strikes and lock outs beyond 14 consecutive calendar days and beyond the reasonable control of the parties affected.

Should one or both the parties be prevented from fulfilling their contractual obligations during the period of Force Majeure lasting continuously for a period of one month, both the parties should consult with each other regarding future implementations of this contract. Both the parties shall cooperate fully to decide upon alternatives for meeting commitments / course of action. Both the parties should consult with each other regarding future commitments/course of action."

54. The tribunal held that neither had BPCL given the 7 days' notice in writing to HPL nor was there any evidence to show that an agreement for postponement of the date of completion of the loading, had been arrived at. It was found that the force majeure clause did not include prohibition of berthing and sailing imposed by CPT. In the absence of a notice invoking the force majeure clause and in the absence of evidence of an agreement to postpone the date of loading, the clause was not attracted. Such finding of the learned tribunal should not be interfered with. The findings are based on facts and

interpretation of the contract. The evidence discloses a request by BPCL to HPL to withdraw the claim for demurrage. Clause 7 of the agreement was also considered. The same is quoted below :-

> "7. DEMURRAGE AND LAYTIME :
>
> a. Demurrage (if any) at load port will be on BPCL account.
>
> b. Total Allowed lay time at load port shall be Thirty Six (36) hours for a parcel size of 20,000 MT. Total allowed lay time shall be increased or decreased on prorata basis (SHINC) with actual loading quantity.
>
> c. Lay time shall commence 6 hours after NOR (Notice of readiness) and shall cease upon hose disconnection.
>
> d. Any delays and time loss due load port limitation shall be on sellers account.
>
> e. In the eventuality of bad weather half time to count as used lay time on time on demurrage.
>
> f. Demurrage Rate shall be as per charter party. Any demurrage charge incurred due to the delay in loading of the cargo at load port (Kochi) shall be borne by the seller whereas any demurrage charge incurred subsequently shall be borne by the buyer.
>
> g. Buyer shall provide vessel owner's demurrage claim, PDPR (Per Day Prorata), and debit note from HPL, regarding the final demurrage applicable for load port within 90 days of completion of discharge of the cargo. Seller will respond to the claim by acceptance or counter within 15 days of claim failing which the Buyer's claim shall be deemed to have been accepted by Seller and buyer shall raise debit note accordingly. Seller shall settle the claim within 15 days from date of debit note."

55. Thus, in respect of Sanmar Sonnet (B/L 30.09.2017) HPL had paid Rs. 5,79,338.00/- against the vessel owner's claim. Therefore, the tribunal held that, HPL was entitled to what was paid and nothing more. The tribunal rejected the submission of the learned counsel for BPCL that, the claim for

demurrage was in the nature of indemnity and subject to proof. The tribunal was of the view that as per the contractual terms, demurrage was payable under the circumstances prescribed under clause 7.

56. The last counter-claim was for risk purchase. Such claim was made on the basis of clause 19 of the Agreement, which was the performance clause. The clause is quoted below :-

> "19. PERFORMANCE CLAUSE :
>
> I. Subject to the clause 16 of the present agreement, in case the seller fails to comply with the terms and conditions as mentioned under Clause 6 – Cargo/Laycan nomination, the Buyer shall in addition to any legal remedies, be entitled to exercise the following option:
>
> • Risk purchase at seller's cost: To purchase from any other source similar material. The price for such purchase shall be deemed conclusively the best price, which the Buyer could obtain. To the price, Buyer may add cost of procurement, if any, to arrive at the Procurement price. If such price is higher than the price fixed for the lot as per the contract terms, then seller has to compensate the Buyer for the loss suffered. The compensation amount will be calculated as follows :
>
> Compensation amount = (Procurement Price obtained from the market – Contract Price considering last day of the laycan being the deemed B/L date) x Buyer's Nominated Qty
>
> II. Subject to the clause 16 of the present agreement in the event the Seller fails to load to vessel within 2 days from the last date of the agreed lay/can, the buyer in addition any other legal and commercial remedies be entitled to exercise the following option:
>
> • Risk purchase at the seller's cost as defined.
>
> • Claim and recover Freight and Demurrage from the Seller in full, Freight and Demurrage calculation shall be as per Charter Party terms.
>
> • HPL shall issue a debit note for the compensation amount, if any, under the present clause to BPCL, payment of which to be done by BPCL through Electronic Transfer within 15 days from the date of Debit Note.

Conversion rate would be as per RBI reference for the pricing period of cargo.

**** **** ****

III. Subject to the clause 16 of the present agreement, in the event the Buyer fails to uplift the nominated quantity or uplifts cargo which is less than the nominated quantity, the seller in addition to any other legal and commercial remedies be entitled to exercise the following options:

a. Risk sale at buyer's cost: To sell to any other potential buyer. The price for such sale shall be deemed conclusively the best price, which the seller could obtain. To the price, Seller may add transaction cost, if any, to arrive at the selling price. If such price is lesser than the price fixed for the lot as per the contract terms, then Buyer has to compensate the Seller for the loss suffered. The compensation amount will be calculated as follows:

Compensation amount = (Selling Price obtained from the market - Contract Price considering last day of the laycan being the deemed B/L date) x Min contractual quantity or Balance contractual cargo quantity not uplifted in MT, as agreed between the Buyer and the Seller.

BPCL shall issue a debit note for the compensation amount, if any, under the present clause to HPL, payment of which to be done by HPL through Electronic Transfer within 15 days from the date of issuing of Debit Note. Conversion rate would be as per RBI reference for the pricing period of cargo.

Without prejudice to the terms and conditions hereof defining ground for claim of Force Majeure, it is further agreed that the Buyer or Seller shall not be liable for any loss, claims or demands, of any nature whatsoever or be deemed in breach of the Agreement, because of any delay or failure in observing or performing any of the conditions or provisions of the Agreement, if such delay or failure is caused by or arises out of any action or order direct or indirect of the Government of India or any agency thereof"

57. The dispute arose in respect of February / March consignment. BPCL was unable to supply the specified quality of Naphtha. BPCL informed HPL that

by mid-February, BPCL was going for export and therefore, no Naphtha was available even for a lesser quantity than HPL's requirement of 30 KT of cargo by February 10, 2018 and close to 40 KT by February 15, 2018. The subsequent facts were gathered by the tribunal from the e-mails exchanged between the parties. Those were dealt with at paragraph 8.3 of the award. The analysis of the above e-mails indicated that BPCL was unable to supply the cargo even during the extended period as it could not meet the parameters with regard to the quality of the components of Naphtha. The relevant period was the laycan period between March 4 and 5, 2018. BPCL had informed HPL about the test results of the 22 KT of Naphtha to be loaded in HPL's vessel, having laycan between 4 and 5 March, 2018. The report was considered by HPL and HPL informed BPCL that the offered cargo was not as per the specifications and could not be accepted. HPL expressed disappointment due to failure of BPCL to supply cargo as per the contractual specifications at the last moment, which had jeopardized HPL's procurement planning and operation. HPL requested BPCL to advise on the next laycan to supply cargo which would meet the contractual quality. Although, after much persuasion, HPL had taken approval from their plant to deviate from the specification, HPL did not expect BPCL to ship out the cargo without considering the requirement of a term customer. BPCL did not advise on the next laycan as requested by HPL. Upon receiving no offer from BPCL, HPL sent an e-mail to International Naphtha Suppliers, enquiring about the possibility of spot supply of 25 KT +/- 10% of Naphtha to be loaded in the first fortnight of April 2018. No reply was received to the said

e-mail. Question Nos. 160 and 281, which were put to RW1 were referred to. On March 15, 2018, trade confirmation was received from Saudi Aramco, confirming the agreement entered into between Saudi Aramco and HPL. The affidavit of evidence of RW2 was relied upon. The agreement was entered into on March 14, 2018 for spot supply of 55 KT +/- 10% of Naphtha with laycan of March 27, 2018. HPL informed BPCL by a letter dated March 17, 2018 that since December, 2017, on account of BPCL's inability to supply the volume of Naphtha required by the agreement, HPL's supply chain had been severely affected. Even deviated quality of Naphtha, as per the specifications offered on February 16, 2018, for the supply in March 2018, could not be provided by BPCL. Therefore, HPL was compelled to opt for risk purchase to ensure feed security to HPL's plant and requested for feedback for the next cargo availability for April 2018. BPCL did not reply. On April 4, 2018, invoice was raised by Saudi Aramco, for supply of 58 KT of Naphtha amounting to $33807431.56. The findings of the learned tribunal are based on the e-mails exchanged between the parties, duly supported by evidence of RW1 and RW2 and the exhibits. The learned tribunal came to the following conclusions :-

> "8.8. The exchange of emails, as referred to above between the parties, are all admitted and are part of the documents disclosed before the tribunal. The next result of the above facts as available from the correspondences discussed above appears to be as follows :-
>
> a) That the shipment for February was due, but could not be supplied by BPCL on account of its export commitments and the February 4-5 laycan was shifted to March 4-5 laycan.

b) HPL requested for 30KT for 4-5 March laycan and BPCL was agreeable to confirm 35KT in that laycan.

c) HPL requested for further 30/40KT for the April 2018 laycan, but BPCL informed that this April requirement of HPL would be in excess of the quantity agreed to be supplied under the present agreement and that such supply should be considered in terms of a new MoU.

d) By 16 02 2018 BPCL intimated quality parameters which were not in line with the contractual parameters and requested for HPL's acceptability.

e) HPL agreed to accept that deviated specification / quality without precedence and requested for confirmation of firm quality specification for future shipments.

f) Subsequently, by series of communications test results of the cargo to be shipped for 4-5 March laycan were shared by BPCL admitting that there was further deviation of the specification shared on 26 02 2018 and requested for acceptability of HPL. BPCL also pointed out that it understood the operational difficulties due to such changes and assured that such deviation would not occur in future.

g) There was admission of deviation of specification by BPCL. Both the parties admitted that there was deviation from the specified quality.

h) Ultimately, HPL could not accede to BPCL's request for acceptance of further deviated quality offered on 26 02 2018. HPL also complained that HPL did not expect BPCL to ship out that 16 02 2018 quality cargo without any consideration of the requirement of a term customer.

i) Admittedly, February laycan shipment was postponed to 4-5 March and then it had offered deviated quality on 16 02 2018 and then on 26 02 2018 offered further deviated quality of specification (than that of the quality shared on 16 02 2018) about six days-before the 4-5 March 2018 laycan.

j) Admittedly, very less time was left for HPL for procurement planning for its requirement in order to run its plant compelling HPL to decline the

offer on the ground that the further deviated quality was unacceptable for its plant.

k) In such circumstances, the option remained with HPL was to go for risk purchase. This risk purchase materialised on 14 03 2018.

l) It also appears from the correspondences that the April laycan also did not materialize.

m) According to BPCL, the April shipment required by HPL was outside the quantity agreed in the agreement. BPCL informed that adjusting the February supply due on 4-5 March since not materialized from the April, supply of 20KT would be due to HPL under the current agreement.

n) HPL's request for next laycan for April 2018 by mail dated 26 02 2018 and 08 03 2018 were not responded to by BPCL.

o) It is also an admitted position that there were some more supplies in July, 2018. However, BPCL insisted that these supplies should be in terms of new MoU on the ground that the current agreement expired by efflux of time with the expiry of April 2018.

p) In the circumstances, HPL, floated a global tender for purchasing the specified quality of Naphtha. However, no response was received by HPL. Ultimately HPL had to spot purchase from Saudi Aaramco 58KT of Naphtha. This also did not match accurately with the specifications agreed in the agreement. However, Mr. Choudhury contends that it was similar to the specifications agreed in the agreement and better in quality than that was offered last by BPCL for 4-5 March laycan. Whereas Mr. Mitra contends that the quality of the offer made by BPCL was better than that was purchased by HPL from Saudi Aaramco.

q) On this ground Mr. Mitra argues the point of mitigation with the additional ground of non-purchase from Indian market resulting into higher price of the cargo added with higher freight charges and customs duties claimed by the respondent."

58. The contentions of the learned counsel for BPCL that the full quantity under the said agreement was supplied by BPCL within the extended period, i.e., July 2018, in terms of the contract, was not accepted. It was held that such supply was independent of the subject agreement. The tribunal observed that clause 19 of the Agreement provided for risk purchase under three situations. First, was the seller's failure to comply with the terms and conditions mentioned under clause 6 relating to cargo laycan nomination. Second situation was the seller's failure to load the vessel within 2 days from the last date of agreed laycan and the third situation was the buyer's failure to uplift the nominated quantity. In the present case, the second situation was found to be applicable i.e. the seller failed to load the vessel within 2 days from the last date of the agreed laycan. In the present case, the laycan was fixed between March 4 to 5, 2018. BPCL was not in a position to supply the required specification. It requested HPL to accept further deviated quality of Naptha, much inferior to the quality disclosed on February 16, 2018. The tribunal held that, BPCL was not in a position to load the agreed quality of cargo. HPL could not be forced to accept the inferior quality. Therefore, according to the learned tribunal, the second situation was attracted i.e. failure to load the vessel within two days from the last date of laycan. Consequence of the failure of the seller under situations 1 and 2 was risk purchase. Risk purchase was held to be the result of default. The relevant paragraphs of the award are quoted below:-

> "8.11. The consequences of seller's failure under situations 1 and Il is the risk purchase. The risk purchase provisions are common in both situations 1 and II. It deals with a particular instance of default in either

of the situations. It is confined to seller's failure to fix laycan in the first case and seller's failure to load the vessel within two days from the last laycan date fixed in the second case. It is not dependent on the supply of the total quantity agreed viz. 240KT +/- 10% under the agreement. It is dependent on the quantity agreed for the laycan fixed and its default. Under the terms of the contract Cl. 1 mentions the total supply as 240KT +/- 10%. This amount is to be supplied in terms of Cl.2 being 20KT +/- 10% at buyer's option every month. In this case buyer had opted for 40KT for February and March 2018 since February 2018 cargo could not be supplied by BPCL on account of its own export commitment. BPCL agreed to supply on 4-5 March, 2018 laycan 30/35KT. Therefore, subsequent delivery is immaterial. Section 19(II) sprang to action as soon there was sellers failure to load within two days of the last laycan date (05.03.2018). Therefore, whether the subsequent delivery was under the same contract or not, is not necessary to be gone into.

8.12. The risk purchase in CI.9 (Il) is not confined only on the seller's failure to load on arrival of the vessel. This clause is to be construed to mean and include seller's failuba to load the vessel even when the seller is not in a position to load on the laycan for arrival of the vessel with the specified cargo agreed between the parties. The failure includes incapacity to load or inability to load on the laycan date. In other words, it is dependent on the readiness to load. The vessel will reach the load port only if the seller informs the buyer that the seller is capable/ready to load on the laycan date. Therefore, Mr. Mitra's argument that risk purchase under situation II is attracted only when vessel reaches the load port, cannot be accepted. Such an interpretation would fall foul of prudent and good industrial practice and would be contrary to due diligence on the part of the seller. Acceptance of such an interpretation would render the risk purchase clause redundant in the given circumstances, such as have happened in this case. Inasmuch as in such a case in order to avail risk purchase the buyer would have to send the vessel knowing fully well that the seller is unable and not in a position to supply/load the agreed quality, incurring cost of charter party.

8.13. Mr. Mitra argues that the price of Saudi Aaramco Naphtha was higher. Whether the price was higher or lower is immaterial in view of Cl.19. Inasmuch as risk purchase entitles HPL to purchase from other source similar material and it provides that the price of such risk purchase shall be deemed conclusively the best price, which the buyer could obtain.

8.14. Endeavour has been made by Mr. Mitra to argue that the Naphtha purchased from Saudi Aaramco was inferior in quality. The burden of proving BPCL's assertion that the quality of Saudi Aramco cargo inferior to that of BPCL's last offered cargo was on BPCL. But BPCL has not given any evidence on this fact. BPCL has not examined any witness on its behalf to assert this fact. We have seen that BPCL had admitted that the quality offered on 16 02 2018 was interior than the agreed quality and this quality further deviated in its last otter and requested for HPL's acceptability. The fact remains that the incidence of Risk-purchase having occurred, Cl. 19-has been attracted. We, therefore, are bound to follow the conditions provided in Cl.19. We can neither red something (which is not there) in the Cluse, nor we can add or introduce something into the Clause. In these circumstances we are to fall back on the materials on record for deciding this question in terms of Clause 19. A comparative table has been given both by Mr. Mitra and Mr. Choudhury and it appears that there were certain parameters, which were better, and the parameters of some were inferior. But the fact remains that BPCL requested for acceptability of HPL of a deviated quality after its inability to supply the agreed quality on account of its export commitment. Even then, the quality deteriorated further from the quality offered on 16 02 2018. HPL had agreed to accept the deteriorated quality shared on 16 02 2018, after persuading its Plant, without creating precedence. But BPCL shipped out that quality without reserving the same for its term customer. But HPL could not persuade its plant to accept the further deteriorated quality shared on 26 02 2018. It is HPL, who would understand its necessity/operation security of the plant situation. It cannot injure itself and take any risk to create disturbance in the plant operation and/or jeopardizing its plant by accepting deviated

quality only to mitigate the sufferance of BPCL. We have also noted that BPCL had admitted that it understood the operational difficulties that might arise due to such changes and assured that this would not occur in future (pg. 91 & 92 RD).

8.15. Mr. Mitra also compares the parameters of the Saudi Aaramco material and the deteriorated material offered by BPCL last and also referred to various questions.

8.16. A comparative study of the specifications offered by BPCL and Saudi Aramco shows that Saudi Aramco had lower Sulphur content and hat parameter of IBP was not available in the test data of Saudi Aramco. Whereas Saudi Aramco Naphtha was within the acceptable contractual parameters unlike Naphtha offered by BPCL. Reid Vapour Pressure being another important parameter was 6.1 psia for Saudi Aaramco and 12.5 psia for that offered by BPCL when the maximum limit was 12 psia. Similarly, in case of Olefin the maximum permissible Vol% being 1.0 in the agreement, was 0.8 Vol% in the Naphtha offered by BPCL whereas it was only 0.03 Vol% in case of Saudi Aaramco Naphtha. That apart, BPCL under the agreement was bound to supply the guaranteed specifications and not similar material. Whereas third party procurement can be of similar material.

8.17. Cl.19 refers to similar material. It does not say identical material. BPCL, having created the problem, cannot force upon HPL to accept further deteriorated material as similar material.

8.18. Mr Mitra's argument on this point cannot be sustained for the reasons enumerated as hereafter. BPCL committed first breach by informing HPL that due to its export commitment BPCL would not be able to supply any quantity of agreed quality even in smaller size for HPL"s February 2018 requirement (R-6 pg 104 RD). This was condoned by HPL. HPL's request for laycan was fixed on 4-5 March 2018. On 16 02 2018 BPCL committed second breach by offering deviated quality (inferior than the agreed quality, R-6 pg 97 8: 96 RD) for 4-5 March 2018 laycan. This was also condoned by HPL by agreeing to accept the deviated quality without creating any precedent. Not being able to deliver this cargo offered on 16 02 2018, BPCL then committed third breach on 26 02 2018

by offering further deviated quality (even inferior to that offered on 16 02 2018, R-6 pg 85-88 86 & 186-192). HPL attempted to condone this breach also by requesting its plant to acknowledge acceptability, which was declined by HPL's plant on the ground of plant safety (R-6, pg 85 RD). This consideration was highly technical. HPL was not expected to take the risk of injuring itself jeopardizing its plant by accepting further deviated quality. These defaults adversely affected HPL's procurement planning for feeding the plant. At this juncture, only 6 days were left for the 4-5 March laycan. After having committed breach thrice, BPCL cannot force its further deviated quality offered on 26 02 2018 upon HPL on the ground that that such deviated quality similar to the agreed quality. The moment the third breach was committed by BPCL, the incidence of risk purchase sprang into action in terms of Cl. 19 of the agreement. Now it is no more open to BPCL to question HPL's risk purchase on the ground that the BPCL's 26 02 2018 quality was similar to or more similar than Saudi Aramco quality and argue that HPL's risk purchase was not justified and that this risk purchase fell foul of the principles of mitigation and as such HPL's risk purchase can not be allowed. This argument seems to be an attempt to put the clock back, inasmuch as once the incidence of risk purchase having occurred, CL.19 was activated and sprang into action by reason of clear and unambiguous terms of the agreement.

8.19. Mr. Mitra argues vehemently on the HPL's failure to mitigate the loss by not purchasing the same from Indian market incurring higher freight and subjecting the cargo to customs duty. He submits that HPL did not endeavour to reduce the cost and mitigate the damages. He relies on AIR 1962 SC 366 [Muralidhar Chiranjilal vs. Harish Chandra Das).The principles enunciated therein are settled principles of law. HPL had the responsibility to mitigate the loss. At the same time, it is also settled principle of law that in order to save the defaulting seller from further damage, the buyer cannot injure itself and take the risk of jeopardizing its plant operation. Such plant operation, in this case, is

technical in nature and plant operators of HPL were the best judges to decide whether such risk was worth taking.

8.20. Mr. Mitra also argues that no notice for risk purchase was given to the claimant. This argument is also untenable. Cl. 19, nowhere in its four corners, speaks for any notice to be given to the claimant before the risk purchase. However, a notice dated 17 03 2018 was given by HPL to BPCL at pgs. 106-107 of RD forwarded by a mail dated 20 03 2018 at 11:04 am at pg. 105 of RD.

8.23. So far as market enquiry in the Indian market is concerned, a general mail was issued by HPL inviting supply of the specified quality of Naphtha, but no reply was received. We must also appreciate the time in between was very short and HPL's plant would have been in jeopardy due to collapse of procurement planning. There is no doubt that the situation was emergent. It has come on evidence that HPL had enquired, but did not enquire from ONGC, Hindustan Petroleum Corporation Ltd. (HPCL) and Indian Oil Corporation Ltd. (IOCL). Mr. Mitra, in his argument, has made a mountain out of this failure to enquire from ONGC, HPCL and IOCL. This has been replied to by Mr. Choudhury that HPL already had term agreement with IOCL and HPCL and that whatever quantities were available for spot supply, did not meet HPL's quality specification.

8.24. Enquiries were made with respect to spot supply availability in March 2018 with foreign (Q.92, 183-184 of RW-l's deposition) and domestic suppliers (Q.125-127 of RW-1's deposition] as well as floating an email enquiry to potential spot suppliers generally (Ext. C-14, initially marked as C-ID-1 during Q.160 of RW-1's deposition). HPL did not enquire about possibility of spot suppliers from Hindustan Petroleum |Q.124 & 224 of RW-1's deposition] and IOCL [Q.124, 239-241 of RW-l's deposition] because it already had term agreements with those companies to purchase all the Naphtha meeting its required specifications and whatever quantities they had with them for spot supplies, did not meet HPL's quality specifications. HPL did not enquire about the possibility of spot supply from ONGC [Q.123 & 126 of RW-1's deposition] owing to the fact that ONGC supplies all the Naphtha meeting

HPL's specifications to its own petrochemical company, OPAL. As a result, after all enquiries, Saudi Aaramco matched as the only supplier with spot supplies then available meeting HPL's immediate requirement. According to Mr. Choudhury, HPL had acted reasonably in the given circumstances and duly satisfied the test of reasonability as recognized by the Hon'ble Supreme Court in M. Lachhia Setti & Sons Ltd. & Ors. vs. Coffee Board | AIR 1981 SC 162 paragraphs 12-14).

* * *

8.27. In respect of mitigation, Mr. Choudhury argues that HPL was under no obligation to injure itself, its character, its business or its property to reduce the damages payable by BPCL, the wrong doer. "The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of facts in the circumstances of each particular case, the burden of proof being upon the defendant." Halsbury's Laws of England V.10 para 143 pg.113 quoted in Muna Sona Sundaram Chettier vs. Sona Theeanna Chockalingam Chettiar [AIR 1938 Madras 672]. The same principle was also enunciated in Prafulla Ranjan Sarkar (supra) and M. Lachhia Setti (supra). At the same time, HPL was not obliged to accept inferior quality Naphtha from BPCL, which was rejected by its plant, merely because the same would have reduced the damages payable by BPCL. Such contention would amount to feeding the breach. HPL commenced its search for that similar material only after validly rejecting the cargo offered by BPCL. The decision in M/s. Muralidhar Chiranjilal (supra) [paragraphs 4, 12 and13] is distinguishable, as in this case the contract had become impossible of performance and the BPCL had to prove the market rate for had similar goods, which the BPCL failed to supply. provided the procurement cost of similar material which is deemed conclusively the best price.

8.29 HPL claimed that the procurement price for 58326.86 KT of cargo value adding the cost of freight, customs duty etc. converted into INR comes to INR 249,28, 18,209.00 (R-8, page 109 RD). The details of cargo value, freight invoice, cargo handling charges, on board charges, marine insurance charges, custom duty etc and the payments made therefor are

on record (Ext-R-8 pages 109 to 126). The procurement price for 30 KT prorata works out to INR 128,21,63,077.00 (paragraph 28 CS). The contract price for
30 KT cargo as per formula works out to INR 116,83,27,675.00 (paragraph 38 read with Annexure D at page 38, Affidavit Evidence of RW-1 and para 26, CS). Thus applying the formula provided in Cl, 19, the difference works out to INR 11,38,35,602.00.

8.30. In the circumstances as discussed above, we hold that HPL was justified in resorting to CI.19 (I) for risk purchase in the given circumstances for BPCL's inability or incapacity to supply even the inferior quality material offered on 16 02 2018, which HPL did not expect BPCL to ship out without any consideration of the requirement of a term customer, and then offering further inferior quality material after having failed to supply February commitment owing to BPCL's export commitment compelling HPL to resort to risk purchase within a very short span of time. Therefore, HPL is entitled to recover the difference between the agreed price and the risk purchase price in terms of the formula provided in C1.19 (t) applicable to C1.19 (II) adding to the purchase price being deemed conclusively the best price the cost of procurement together with freight, customs duty etc. proportionate to 30KT out of 58KT spot purchase pro rata on all these counts. HPL shall also be entitled to interest at the rate as agreed in Cl. 5 from 15 days after the raising of the debit note by HPL after 26.04.2018 (the date of payment to Saudi Aramco) till the date of Award."

59. Such findings of the learned tribunal are also based on the materials on record and the understanding of the clauses of the contract. The explanation of BPCL in not being able to supply either the quality of Naphtha that was originally agreed or the quality with deviations which was later agreed, were considered and rejected with reasons. BPCL asked HPL to agree to accept a further low quality of Naphtha which was found to be contrary to the agreed

terms and the nomination of the buyer. Thus, it was held that as the seller could not ensure supply of the quality of Naphtha that was nominated, the risk purchase clause would be applicable, irrespective of whether a higher price was paid to Saudi Aramco and in spite of there being other sellers of Naphtha in the country or even if the quality supplied by Saudi Aramco was worse than the quality offered by BPCL. Whether the vessel was actually berthed or not, could not be relevant in view of the unreadiness to supply. With regard to the quantity of Naptha supplied later, it was found that the same was not connected with the cargo involved in the risk purchase.

60. The issues have been discussed in details, as above. Some important judicial authorities are discussed to test whether the award is liable to be set aside upon application of the ratios laid down.

61. The Hon'ble Apex court in ***OPG Power Generation Private Limited vs Enexio Power Cooling Solutions India Private Limited and Anr.*** reported in ***2024 SCC Online SC 2600,*** upon discussing the decisions rendered earlier on such issue held that, an award could not be said to be against public policy of India if there was a mere infraction of the municipal laws of India. For an award to be in contravention with the public policy of India, there must be infraction of the fundamental policy of Indian law including a law meant to serve public interest or public good. Such situation has not arisen in the instant case.

62. In ***Oil and Natural Gas Corporation LTD. (ONGC) v. Saw Pipes Ltd.*** reported in ***(2003) 5 SCC 705*** it was held that when an award was patently in

violation of statutory provisions, the same would be contrary to public interest. Such an award was likely to adversely affect the administration of justice. An award could be set aside on the ground of patent illegality, if it was so unfair and unreasonable that it shocked the conscience of the court. Such award would be adjudged as opposed to public policy. As discussed earlier, this court does not find that the award shocks its conscience.

63. In ***Associate Builders vs Delhi Development Authority*** reported in ***(2015) 3 SCC 49,*** the Hon'ble Apex court held that the principle of *audi alteram partem* was undoubtedly a fundamental juristic principle in Indian law. It was held that disregarding orders of superior courts or the binding effect of the judgment of a superior court, would also be regarded as being contrary to the fundamental policy of Indian law. It was further elaborated that when a finding was based on no evidence or an arbitral Tribunal took into account something irrelevant to decide the issues or ignored vital evidence while arriving at its decision, such decision would necessarily be perverse. To this, a caveat was added by observing that when a court applied the public policy test to an arbitral award, it should not act as a court of appeal and consequently errors of fact could not be corrected. Similarly, a possible view of the arbitrators on facts also could not be corrected as the arbitral tribunal was the master of the quality and quantity of evidence and the facts. The quality of the evidence, that is, the evidence was up to the expectation of a judicially trained mind, would not per se render an award vulnerable. Thus, if the arbitral Tribunal's approach was neither arbitrary nor capricious, the tribunal

would have the last word on facts and evidence. The court finds that the approach of the learned tribunal was reasonable and not arbitrary.

64. The Hon'ble Apex court in ***Ssanyong Engineering and Construction Company Limited vs National Highway Authority of India*** reported in ***(2019) 15 SCC 131,*** held that the award would be vulnerable if patent illegality appeared on the face of the award and such illegality went to the root of the matter. If an arbitral tribunal wandered beyond the contract and dealt with matters not referred, would also be a jurisdictional error and the award could be set aside on the ground of patent illegality. This is not such a case.

65. In view of the discussions which have been made in the foregoing paragraphs with regard to the manner in which the arbitral tribunal had dealt with the claim of the petitioner and the counterclaim of the respondents, this court does not find that justice has been denied, inasmuch as, the award so passed has neither shocked the conscience of the court nor is the award patently illegal.

66. In paragraph 59 of ***OPG*** (supra), the Hon'ble Apex Court discussed morality. Morality was also held to be akin to shocking the conscience of the court. In paragraph 60, patent illegality was discussed and it was held that if an award patently violated statutory provisions, it would be against public interest and thus the award could be set aside on the ground of patent illegality.

67. Perversity as a ground of challenge was discussed in paragraphs 63 to 67. It was held that the decision of the tribunal should be so irrational that no

reasonable man could have arrived at such a finding. Paragraph 63 to 67 are quoted below:-

> "63. Perversity as a ground for setting aside an arbitral award was recognized in Western Geco (supra). Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.
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> 64. In Associate Builders (supra) certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where: (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.
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> 65. In Ssangyong (supra), which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse,

66. The tests laid down in Associate Builders (supra) to determine perversity were followed in Ssyanyong (supra) and later approved by a three-Judge Bench of this Court in Patel Engineering Limited v. North Eastern Electric Power Corporation Limited.

67. In a recent three-Judge Bench decision of this Court in DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd. [DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., (2024) 6 SCC 357 : (2024) 3 SCC (Civ) 112 : 2024 INSC 292] , the ground of patent illegality/perversity was delineated in the following terms : (SCC p. 376, para 39)

"40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

68. Scope for interference with an arbitral award was discussed in paragraph 68 and 69 which are quoted below:-

"Scope of interference with an arbitral award

68. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon.

> It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.
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> This extract is taken from OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417 : 2024 SCC OnLine SC 2600 at page 473
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> 69.In Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 27-43] , a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law."

69. In Paragraph 71.1 of ***OPG*** (supra), it was held that, in order to avoid being vulnerable to challenge, the tribunal's reasons must deal with all the issues that were put to it. It should set out the finding of facts and its reasons so as to enable the parties to understand them and state how particular points were decided. The tribunal was required to set out not only its views, but also make it clear that it had considered the alternative version and had rejected such version. The said paragraph is quoted below :-

> "71.1 As to the form of a reasoned award, in *Russell on Arbitration* (24th Edition, Page 304) it is stated thus :

> "6.032. No particular form is required for a reasoned award although 'the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators reduces the scope for the making of unmeritorious challenges'. When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen and explain succinctly why, in the light of what happened, the tribunal has reached its decision, and state what that decision is. In order to avoid being vulnerable to challenge, the tribunal's reasons must deal with all the issues that were put to it. It should set out its findings of fact and its reasoning particular points were decisive. It should also indicate the tribunal's findings and reasoning on issues argued before it but not considered position with respect to appeal on all the issues before the tribunal. When dealing with controversial matters, it is helpfulfor the tribunal to set out not only its view of what occurred, but also to make it clear that it has considered any alternative version and has rejected it. Even if several reasons lead to the same result, the tribunal should still set them out. That said, so long as the relevant issues are addressed there is no need to deal with every possible argument or to explain why the tribunal attached more weight to some evidence than to other evidence. The tribunal is not expected to recite at great length communications exchanged or submissions made by parties. Nor is it required to set out each step by which it reached its conclusion or to deal with each and every point made by the parties. It is sufficient that the tribunal should explain what its findings are and the evidential route by which it reached its conclusions."

70. The award, which has been scrutinized in detail, indicates that the contentions of the petitioner were taken into consideration and applied in the context of the terms and conditions of the contract. As long as the relevant issues have been addressed, the award is sustainable on the ground of adequacy of reasons. It is sufficient if the tribunal explains what the findings

are and the evidence on the basis of which the conclusions have been arrived at. An award will pass the test of being a reasoned award, if it reads properly, is intelligible and adequate.

71. Paragraph 72 of ***OPG*** (Supra) laid down that, if the conclusion of the arbitrator was based on a possible view of the matter, the court should not interfere. It was further held that an arbitral tribunal had the jurisdiction to interpret a contract, having regard to the terms and conditions of the contract, conduct of the parties, correspondences exchanged, circumstances of the case and pleadings. The relevant paragraph is quoted below:-

> "72. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not intefere [ See : SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16; Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] . But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference."

72. The submissions of Mr. Bose with regard to the illegality in the award do not pass the tests which have been laid down in the above judicial authorities.

73. In ***Dyna Technologies Private Limited vs. Crompton Greaves Limited*** reported in ***(2019) 20 SCC 1***, a Three-Judge Bench of the Hon'ble Apex Court held that the jurisdiction under section 34 of the said Act could not be equated with the normal appellate jurisdiction. Rather, the approach would be to respect the finality of the arbitral award as well as the party's autonomy to get the dispute resolved by an alternative forum as provided in law. In the said decision, the Hon'ble Apex Court also held that the award was amenable to challenge if no reasons were recorded or the reasons recorded were unintelligible, improper and revealed a flaw in the decision making process. The scope of interference of the courts on the interpretation or the construction of the contract by the tribunal was also discussed in the said decision and it was held that the Courts should not interfere when the view of the arbitral tribunal on the terms of the contract was a possible view. It was further observed that the arbitral Tribunal had the jurisdiction to interpret a contract having regard to the terms and conditions of the contract, conduct of the parties, the correspondences exchanged, circumstances of the case and pleadings.

74. The reference to British Shipping Laws, definition of laytime, laycan, and shipment period in FOB sales, and the authority cited by Mr. Bose, are not relevant in the present context. The difficulties which arose in practice, when parties to a FOB contract used the words laytime or laycan, to indicate the date of shipment, were deliberated upon. In the case in hand, although the expressions laycan and laytime were used in the contract, the counter claims

were allowed, on the interpretation of the clauses of the contract. The definition of laycan in the context of risk purchase to contend that, as the vessel had never arrived, BPCL could cancel, was found irrelevant in view of clause 19. The learned Tribunal clearly held that, the circumstances to allow the counter claim under the head risk purchase in terms of clause 19 of the contract, existed. The seller was not in a position to supply the quality of goods either within the dates which were settled or thereafter and could not even advise as to when the cargo would be available. Under such circumstances, the Tribunal found from the evidence that, HPL had no other alternative, but to approach Saudi Aramco for spot purchase.

75. ***McDermott International Inc. v. Burn Standard Co. Ltd.*** reported in ***(2006) 11 SCC 181,*** does not support the case of the petitioner.

76. ***PSA SICAL Terminals (P) Limited vs Board of Trustees of V.O. Chidambar Port Trust Tuticorin*** reported in ***2021 SCC Online SC 508*** is also a decision on the tribunal's authority to interpret a contract and the correspondence exchanged by the parties. The subject award, as already discussed above, has taken into consideration the contractual terms and the correspondence exchanged between the parties. Oral and documentary evidence have been considered. Weighing of evidence by this court cannot be permitted. The tribunal is the best judge in respect of both quality and quantity of evidence.

77. In ***Steel Authority of India Limited versus M/s TLT Engineering India Private Limited and Anr.,*** the Hon'ble Court held that, a court

exercising jurisdiction under Section 34, of the said Act, could not undertake an adjudication, so as to supply reasons in support of an award or supplement the reasons of the arbitral tribunal. In this case, the court is not required to justify the findings arrived at by giving additional reasons and further interpretations.

78. The decisions ***Rajinder Kumar Kindra vs Delhi Administration through Secretary (Labour) & Ors.*** reported in ***(1984) 4 SCC 635 and K.P. Poulose vs State of Kerala*** reported in ***(1975) 2 SCC 235*** have no relevance.

79. The award is based on reasons, appreciation of evidence, both oral and documentary and interpretation of the contract. The award refers to the answers to the relevant questions put to RW1 and RW2. The award deals with the correspondence between the parties. Each issue was dealt with separately and decided. The findings are intelligible, adequately reasoned and sound.

80. Under such circumstances, this application is dismissed. GA COM 2 of 2024 is accordingly disposed of. The award is upheld.

**Later**

81. Learned Advocate for the petitioner prays for stay of the award. The prayer for stay is refused.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Shampa Sarkar, J.**)